COMMONWEALTH OF AUSTRALIA

Official Committee Hansard

HOUSE OF REPRESENTATIVES

STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS

Reference: Copyright Amendment (Digital Agenda) Bill 1999

THURSDAY, 21 OCTOBER 1999

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HOUSE OF REPRESENTATIVES

STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS

Thursday, 21 October 1999

Members: Mr Kevin Andrews *(Chair)*, Ms Julie Bishop, Mr Cadman, Mr Kerr, Ms Livermore, Mr Murphy, Mr Ronaldson, Ms Roxon, Mr St Clair and Mrs Danna Vale

Members in attendance: Mr Kevin Andrews, Ms Julie Bishop, Mr Cadman, Mr Kerr, Ms Livermore, Mr Murphy, Ms Roxon and Mrs Danna Vale

Terms of reference for the inquiry:

Copyright Amendment (Digital Agenda) Bill 1999

WITNESSES

Committee met at 9.11 a.m.

CHAIR—I declare open the House of Representatives Standing Committee on Legal and Constitutional Affairs inquiry into the Copyright Amendment (Digital Agenda) Bill 1999. Most of you who are here today have appeared before the committee on previous occasions. Today we will divide the morning into two sessions: this first session will look at enforcement measures in the legislation and the second session will examine retransmission and broadcast issues and related matters.

We adopted this roundtable format for hearings last Thursday morning, when we were dealing with two other issues, in an endeavour on the part of the committee to enable us to hear from opposing viewpoints about various issues so that they can be tested by those who have different viewpoints. The committee can therefore test some of the propositions in a manner which is perhaps more conducive for us to arrive at an outcome than simply hearing from one group and then the other, although we have done that in the previous hearings. We found that last week's roundtable was most useful from our point of view and beneficial. We hope that this morning will be also.

There are a couple of procedural matters for those who were not here last week. Could I ask that, in order to preserve the parliamentary privilege which attaches to these proceedings, any questions be addressed through me if you wish to put a question to someone else. Otherwise the questions will generally come from members of the committee. Rather than having long rhetorical flourishes about the undoubted position which you occupy and, in general terms, why something should or should not be in the bill, I would like, if we can—because of time—to get to the precise points or issues in question which you have views about. If you have particular views about drafting and the detail of that, then it would be useful to attend to that detail.

You should all have a copy of the outline booklet which we are using, in which we have tried to set out what the policy issues are as we discern them from the government's discussion paper, from the second reading speech given in parliament and from other sources. It contains the provisions themselves and some of the arguments as we understand them for and against the particular propositions. What I would like to do is take each of those subsections of the issues before the committee and deal with them one by one to give you an opportunity to have an input into them so that we can perhaps better come to some understanding of the position.

I should also advise you that although the committee does not require you to give evidence under oath, the hearings today are legal proceedings of the parliament and warrant the same respect as proceedings of the House itself. The giving of false or misleading evidence is a serious matter and may be regarded as contempt of parliament. The evidence today, as I said, will be recorded by *Hansard* and will attract parliamentary privilege.

Participants

CAMERON, Ms Jasmine, Manager, PANDORA Project, and Manager, Technical Services, National Library of Australia

CANDI, Mr Emmanuel, Executive Director, Australian Record Industry Association and of the Phonographic Performance Company of Australia Ltd

O'BRIEN, Ms Cathy, Solicitor, Australian Record Industry Association and of the Phonographic Performance Company of Australia Ltd

GILLARD, Mr Matthew Ian, Member, System Administrators Guild of Australia (SAGE-AU) Inc.

GONSALVES, Mr Maurice, Solicitor, Business Software Association of Australia

HALPRIN, Mr Geoff, Executive Committee Member, System Administrators Guild of Australia (SAGE-AU) Inc.

METALITZ, Mr Steven J., Vice President and General Counsel, International Intellectual Property Alliance

WODETZKI, Mr Jamie, Legal Adviser (External), Australian Digital Alliance

Session 1—Enforcement measures

CHAIR—The first issue under the enforcement measures that we have identified and set out in the notes relates to the definition of electronic rights management information and, in particular, the definition in clause 10 of the bill. Would anybody like to kick the ball off? Mr Candi?

Mr CANDI—We have a problem with the drafting. It omitted by accident or in some other unintended way to cover the requirements of article 19 subsection 2 of the WPPT treaty. It has left out reference to the producer and performer requirements in the information. We have a suggested redraft here that we could hand up and pass around.

Mr CADMAN—Which section?

Mr CANDI—Item 9, subsection 10 (1), electronic rights management information. Could we pass these around and just draw it to your attention? We suggest that in item (a)(i)—

CHAIR—Mr Candi, it may be useful if we wait till we get your copy and then we can follow you more easily.

Mr CANDI—In (a)(i), we take out the words 'and' and 'or' in the first line and then add on the words 'performer, the performance of the performer, the producer of the sound recording or the sound recording'. These are what is referred to on page 2 of what I handed out.

CHAIR—Take us through that again, Mr Candi.

Mr CANDI—It is back on item 9, subsection 10, electronic rights management information. In paragraph I of the lead paragraph (a), it is very simple to add the words 'performer, the performance of the performer, the producer of the sound recording or the sound recording' and then change the word 'and' to 'or'. These additions are referred to in article 19(2) of the WPPT. I think it was just an unintended omission. We have added to subparagraph (b) a reference to the information in paragraph (a) so it is clear what the information is about. I suspect that it is pretty non-contentious.

CHAIR—I suspect we will find out very shortly.

Mr CANDI—That is right.

CHAIR—Thank you, Mr Candi. Are there any other comments on Mr Candi's proposal? Speak up now or forever hold your tongue. The second provision is 'Manufacture and dealing in circumvention devices'. There is a raft of provisions in the bill in relation to that.

Mr HALPRIN—I am here representing the System Administrators Guild of Australia, the people who keep computers operating on a daily basis. We are some ways like the gatekeepers of the Internet and the janitors of the computer system. One of those key respects is that we make use of an enhanced level of privilege in order to troubleshoot and resolve problems.

I should say at the outset that we agree with the intent of what the bill is trying to achieve, but the current wording of the bill would effectively make every company in Australia operate illegally on a daily basis because every company in Australia has system administrators, even if they do not realise they have them. Anyone who does something relating to file permissions could be read as infringing an effective technical protection mechanism. There is no qualitative or quantitative definition of whether that technical protection mechanism is effective. It is merely called effective by the fact that it exists.

One of the key aspects of the system administration community is the management of computer security. A very important aspect of the management of computer security is the communication and use of that information to attempt to breach those machines that we are legally responsible for. We are acting here with the authority of the owners or operators of the equipment. We are operating completely under our jurisdiction. Under the current wording of the bill, we would be acting illegally because we would be providing circumvention services and using circumvention devices. So we are seeking to have that anomaly removed so the words of the bill match the intent of the bill. To that end, you will find a supplementary submission where we have provided what we believe to be some modifications to the section to enable that.

For example, there are two approaches for skinning this cat: one is exemptions for a class of activity and the other is exemptions for a class of person. Specifically with relation to exemptions for class of activity, we are looking for an exemption relating to those things we have to do as our obligation, such as those involved in the management of computer systems and networks. We are also looking for an exemption for that work related to the

investigation, evaluation and communication of defects relating to effective technical protection mechanisms. The bottom line is that the bill in its current form would prohibit exactly the activities that strengthen those very effective protection mechanisms that the bill is seeking to protect.

As further supporting evidence, I have given you copies of an article called *The hacker in all of us*. It is to show that companies such as Ernst and Young are running courses teaching their customers how to break into their systems. These big accounting, consulting and auditing companies consider this is a very important aspect of auditing of computer systems and improving security. We are in complete agreement with that.

There is also attached a copy of a monthly security digest which shows the number of security issues that have been communicated just in the last month on various platforms. The very communication of that information would be illegal under the act as presently drafted. We see it as a real issue because, while it would not stop this communication from happening, it would mean Australians could not get that information and could not protect their sites with that information and could not contribute to those forums.

CHAIR—Mr Halprin, before I come to your proposed amendments, can I just ask the other members of the panel whether there are any disagreements with the intent of what Mr Halprin is suggesting?

Mr METALITZ—Thank you very much, Mr Chairman. I am not sure there would be a disagreement as to the intent, but I think his proposal begs a couple of questions. The first one has to do with the treatment of the use of circumvention devices and services all together because many of the activities that he is referring to, if I understand his concern, go to the use of these circumvention devices or services. This bill does not prohibit the use of circumvention devices or services in any circumstance and we think that is a serious flaw in the bill. It certainly is relevant to the points that he is raising.

The second point, which is related to the first, is that if there is a need for an exception for the activities of systems administrators in security testing, I would question the scope of the problem because in many cases the copyright owner himself will have exactly the same interest as the system administrator in making sure that unauthorised access to his copyrighted material does not occur. If there is a need for a carefully crafted exception, it should be an exception to a prohibition on use of devices and services, and should not be an exception to the prohibition on trafficking in devices and services or on manufacturing, importing and distributing them. I think this points up one of the concerns that the copyright industries generally have about the approach taken in the bill—that is the lack of a prohibition on the use of circumvention devices and services.

Ms ROXON—I will ask a question which will reveal my technical ignorance in this area; hopefully someone will be able to assist me with it. I understand the purpose of a circumvention device, but when we talk about manufacturing and selling circumvention devices, I understand that they are not necessarily something that we can hold in our hand at any time. A device could be a program and could be transmitted through the Internet. What is the range of things that a circumvention device would look like? I know that sounds like a terribly basic question, but it would help if someone could explain it to us.

Mr HALPRIN—It can be in any number of forms. Ultimately, it is either in the form of a manual procedure or an automated version in the form of a tool. Protection mechanisms are something as simple as file permissions. The act is about protecting copyright and the information on computers is, by definition, copyright work. Any time you open a word processor and store that document, that is a copyright work. So we are not just talking about computer programs but about all of those works. If you create in even your mail box or a word processor document, and you have file permissions on that that say only I can read it, that is a file protection mechanism. If I have a program that scours the computer system looking for bad settings of permissions, and does something with that such as report back to me, that is in breach of the act as it stands because that is circumventing an effective technical protection mechanism.

If I have a program which I run as a system administrator, and should run regularly, which looks for bad selections of passwords, because they are the weakest link in security, that would be completely illegal under the act. It would be with the complete authority of the operators of the computer, because we are the guardians of that information, but there is this line between whether it is being done as part of your duties in looking after the machine or whether it is being done by the general public running a password cracking tool, which would clearly be what the act is intending to catch. But a system administrator doing the same is in fact protecting their system and protecting the integrity of those very works. Does that help?

Ms ROXON—Yes, it does. It highlights how much assistance we need from this session by way of some practical suggestions as to how you get around this, because we are really saying, 'We need to be worried about manufacture but not use,' or 'We need to be worried about use but only these types of uses.'

Mr HALPRIN—It is more complex than that. The problem is that all of the activities that were supposedly things that should clearly be illegal, such as import, communication and creation, which are the ones that were mentioned, are in fact vital. The importing of tools means that when we download one of those very tools off the Internet, that is an importation of a device. If we are importing a password cracking program, that is importation. If we are posting to one of the security lists, such as these alerts that I mentioned, which state, 'Here is a current problem with the Microsoft NT operating system; here is the work around such and such,' if we post that very information, that is communication of a circumvention device.

If we create a tool to look for a particular flaw so that we can correct that flaw, and so that we know whether it is present, because we have perhaps many thousands of machines that we are responsible for administering, so the only way to do that is to automate those very steps, we have now created a circumvention device. So in all the cases mentioned, those responsibilities are vital to our being able to do our job properly. It is clearly the intent here, and our problem is that because these sections no longer require an actual breach of copyright or, for that matter, the intent to breach copyright to occur before the act is illegal, it presents a real problem. The fact that they are no longer bound and there is no intent to infringe present in the legislation as drafted means that everything we do becomes illegal.

CHAIR—Mr Metalitz, as I understand your position, it is not that you are opposed to what Mr Halprin is saying, it is a more fundamental issue. With respect to the way in which the act is drafted, using specific instances of circumvention such as the importation of devices, et cetera, you are saying there should be a general prohibition on use and then one could have some exception to that along the lines of what Mr Halprin is suggesting.

Mr METALITZ—Yes, Mr Chairman, I think it is important to have a prohibition on use in at least some circumstances, but I do think there are many uses that do not need to be caught by that prohibition. It might be helpful to step back for a moment and, in response to your colleague's question, speak a little bit about the types of protective measures—and the other witness has already mentioned some of these—that are so essential to copyright owners in the digital age and in the age of network distribution of copyrighted materials.

These types of technological protection measures basically take two forms. One form is access control mechanisms such as those that the witness referred to. These allow the copyright owner to control who has access to copyrighted material, whether it be a sound recording, a motion picture, computer software and so forth. It could be something as simple as password protection, it could be encryption, it could be many other mechanisms that are used, for example, to give access within a certain period of time under a licence and to deny access after that period has expired. That also is carried out through a technological protection measure that is an access control. Circumventing that access control may or may not result in an infringement of the copyright. It results in access to the protected material, but whether or not that act is an infringement of copyright will vary depending on the circumstances.

The second type of technological protection measure is more closely allied with copyright, and that is what we might refer to as copy control mechanisms. These technologies may also control the communication of the work to the public, or may allow a certain number of copies, or may allow first generation copies but prevent second generation copies, and so forth.

In that case, it is assumed that the person has legitimate access to a copy of the work, and the technology simply manages what that person can do with the access that he or she has legitimately obtained. Those are two different kinds of technological protection mechanisms, and they both can be circumvented. The first kind can be circumvented by someone who hacks into a system, evades password protection, decrypts encryption, dismantles one of these time controls on access to software, for example. The second kind can also be circumvented by someone who evades a copy control protection. I think it is important for Australia's legislation, as with the legislation that has been adopted in the United States and the legislation that is under consideration in Europe, to deal with both kinds of technological protection measures and circumvention of both sorts.

This is what the treaties require, since the treaties speak quite broadly about technologies that control acts in respect of works, and I think the bill takes a very positive step away from the exposure draft approach by delinking this from the necessity to prove infringement of copyright. This is a separate but related type of offence that we are talking about here. Again, to take the access control situation, if I do not have licensed access to computer software or to a digital version of a sound recording and so forth, and if I circumvent that

control, I decrypt it, I evade password protection, or in some other way gain unauthorised access, I think it should be recognised that I have committed an offence. I have done something that the law should prevent, whether or not what I then do with the material to which I have gained access is itself an infringement of copyright.

If I could use a kind of real world example of this, it is like having a skeleton key to your house so that I can get in and read a book in your library. What I do with that book may not be an infringement of copyright at all, but you have imposed an access control on my ability to access that copy, and if I circumvent that, if I pick the lock, then I should be liable. That at least should be the general rule, from our point of view, and then we can certainly deal with the question of exceptions to that general principle.

Mr HALPRIN—I agree with the general intent that, as a general rule, you might ban that activity but then provide exemptions for system administrators, who clearly are a class of people who are not intent upon infringing. But, to make the waters a little more muddy, we may be the gatekeepers, the operators of those machines, but may not be the owners of the equipment, nor necessarily the owners or licensees of the copyright work. For example, with any bureau, any ISP, if you have an account on an ISP, that is your copyright works that may exist on their machines.

As a system administrator on those machines, I am responsible for maintaining the integrity of those machines, but I am now operating certainly without the direct authority, only with the implied authority, of the owner or licensee of the copyright. If I am performing security audits of machines that have illegal content on them, I may not know that that is illegal content; I certainly will not know ahead of doing the audit. So it comes back to this issue of intent. Certainly, in the case of those people performing maintenance activities as required by their companies, there clearly needs to be a proof of intent before anything can be assumed to be for the wrong purpose.

Mr KERR—You have raised an issue which you may be able to dismiss completely. As you mentioned your responsibility in relation to illegal content, the debate that we have had recently about kiddie porn and that sort of stuff suddenly flashed into my mind—the obligations of ISP site managers in relation to some issues about content. I am not certain how far your responsibilities under that legislation go, but I think there are at least some legal obligations.

Mr HALPRIN—There are. We watched this legislation very carefully. Whilst there are a number of members who personally find the legislation distasteful, from a professional body's perspective, the legislation was correct in that it does not force our members or, in fact, anyone outside the ABA, to play censor. The limit of the responsibility of our members is to take down orders that are issued by the ABA and to follow directions. So our members are not in the position of becoming editorial censor.

Mr KERR—So there is not an overlapping issue here?

Mr HALPRIN—No, not on these.

Mr KERR—I just wanted to know whether the water was even yet more muddy.

Mr HALPRIN—Probably, but not than I am aware of.

CHAIR—Would you like to make a comment, Mr Wodetzki?

Mr WODETZKI—I would like to make a couple of initial comments and then respond to some of the other comments that were made. The main point that we would like to make, and our strong view on this, is that these measures are a vehicle for enforcement of copyright; they are not a vehicle for extension of copyright. I think that is where we differ very strongly with the views that are being put by some of the other witnesses and a view that was just put by the IIPA.

This is being regarded by them, it seems, as the second bite of the cherry. We have had one big debate about the scope of protection of rights and the scope of exceptions, and then along comes this argument that we need new enforcement measures and they use the argument of enforcement as a veil for extending their rights. They now start talking about access control as if the right to control access was one of their rights under copyright, which it is not.

They also say that this is required by the treaties. Again, that is not true. The treaties require adequate legal protection and effective legal remedies—which are somewhat rubbery terms, but we can make our own mind up about what that means—against the circumvention of effective technological protection measures. We can call those protection devices or access control devices or whatever you like, but it is only devices that are used to restrict acts which are not authorised by the authors or permitted by law. It does not require you to provide any remedies or sanctions against circumventing devices that are used to restrict acts that are not protected by law, namely, acts that are public domain activities or activities permitted by an exception.

The bottom line, from our perspective, is that talking about what the treaty does and does not require is beside the point. The treaty was drafted almost deliberately ambiguously so that different countries could go away and have this battle in their own domestic legislatures and not have to worry about it all being mandated from Geneva. But it is quite clear that the treaties do not require us to do anything particular along the lines that have been suggested by some of the others. The only thing that the treaties do require is some sort of remedies and sanctions that are effective against circumvention of measures designed to protect copyright, not designed to extend copyright. That is a fundamental point that runs through all of these discussions. When you then start talking about whether this is covering access control devices sufficiently or only copy control devices and various other things, it goes to that question of: what are we trying to do here—are we trying to enforce copyright, or are we handing to the copyright owners a tool for extending it?

The link to infringement is critical. It is, in fact, delinking—which I think was the word used by the IIPA—that gives rise to all these problems. The systems administrators are not the least bit concerned about or setting out to infringe copyright. They are setting out to engage in legitimate security testing activities. They are playing with devices, they are trying to get around devices. They are not doing so to infringe copyright. It only illustrates that the focus on devices delinked from infringement is where you run into problems.

The focus in this provision should be on providing measures against devices used to protect against infringement, but not going beyond that. In our view, it is very dangerous to go beyond that. If you come in with a very strong position in this law and provide a really strong regime that basically keeps all devices out of the hands of everyone, then those legitimate users in the community who previously had rights to do things with copyright material that was not infringement can now be locked out.

Mr KERR—It would help in understanding this to have a little bit of illustrative example. This is working at a high level of abstraction.

Mr WODETZKI—Yes.

Mr KERR—It would be useful if you could.

Mr CADMAN—Thank you, Duncan, because I do not understand. If a device is to circumvent copyright what other uses has it?

Mr WODETZKI—There are two steps. You can circumvent a protection measure and then you can do something else—you can either use a work in a way that is not an infringement or you can use a work in a way that is an infringement.

Mr HALPRIN—Or you cannot use the work at all.

Mr WODETZKI—Or you cannot use the work at all.

Mr HALPRIN—You can merely be concentrating your efforts on the protection mechanism.

Mr KERR—I think Jamie was trying to make the point, which has whooshed right over my head, that there are a lot of public domain uses that would be otherwise lost to the community if this goes ahead. To the extent that this argument is valid, I would like to get a fix on what we are talking about because I am hearing two arguments conducted at a very high level of abstraction, neither of which really touch my heart. I do not really understand who are winners and who are losers.

Mr HALPRIN—I am not sure if this is an appropriate example, but perhaps the general area of encryption. Research into encryption is a mathematical research area. It is an issue that is used for all forms of work on computers, not only for protection from wrong eyes or whatever else but also for authentication. In fact, the entire e-commerce world that is coming up is based on the notion of authentication—are you who you say you are?—and that is based in cryptography. That is one of the mechanisms used for effective technical protection. Could that then be misconstrued to say that anything you do looking at cryptography is covered by the fact that it is also used by that one particular purpose?

Mr WODETZKI—I can give a few examples. One good one addresses one of the flaws with the current drafting and the narrowness of permitted purposes. We support a broad permitted purpose exception because we think it is not always wrong to get hold of a device

and it is not always wrong to use a service. It is therefore not always wrong for someone to supply a device and it is not always wrong for someone to supply a service.

The situation might be as follows, and you need to look a little bit down the track here. A library acquires something in electronic form in its collection and it is subject to a copy control device. We move 10 or 15 years down the track and the library is looking at ways of maintaining its collection. It needs to make preservation copies sometimes to ensure that our historical records do not decay into nothing. There is not yet any certainty, at least as I am advised, that a lot of these whizzbang forms of storage will last into the future. So the library is holding a bunch of CD-ROMs that are all copy protected, and the publishers have lost the keys or are not contactable or whatever. In that situation, if the library wants to make a preservation copy it is going to need access to a device that circumvents the copy protection system.

Mr CADMAN—Shouldn't that be done by exception, though, on application? I would have thought that would be easily covered.

Mr WODETZKI—The point I am trying to illustrate is that it is not currently one of the exceptions. You could go down the exception path. We can accept that that is going to make sense here and now, because you then run through your mind as many situations as you can think of that are going to give rise to problems for the users and that are going to upset the balance, and then you address them all by exception. But the problem is that you cannot think of everything and things are going to come up.

Mr KERR—Do you think it is the nature of copyright legislation? I remember as minister having to make dozens of little changes here and there around the edges as new issues arose. I assume that if it does become necessary in those circumstances it will raise a public policy issue and slip through as, say, copyright amendment No. 749 of the year 2046. I appreciate your point, Jamie, but I was actually trying to grab hold of something that says that there is stuff out there that the public is entitled to do now that they will not be able to do because people are going to lock it away outside the range of their present copyright entitlements.

I just wondered whether there is a smoking gun. You have raised a very good point. I am quite happy to entertain all the points you can raise that may go to preservation and the like, but absent is some sort of larger picture in my head about what we are actually trying to save in terms of the public's rights. I understand the system administrator's point. I do not wish to diminish that. It was something I had not thought about.

Mr HALPRIN—Can I extend the problem to the amateur administrator system administrator field. Perhaps that is an example. The simple fact is that when you have a problem with your PC, you turn to someone; you do not necessarily ring up an IT help desk. That person is being a systems administrator whether they know it or not. Every time you have a problem getting your printer to work, it is a systems administrator who is fixing it whether they know it or not.

Mr KERR—It is usually my 10-year-old.

Mr HALPRIN—Exactly.

Ms ROXON—In terms of the sort of exemption we might look to for a systems administrator, doesn't that actually undermine your position quite significantly if every 10-year-old child who can make things work for their parents is going to have the exemption apply to them? Why even have the prohibition to start with? Everyone is going to be within your exemption and we get back to square 1.

Mr HALPRIN—That is a valid point. If the exemption were to be that broad then certainly that would be an issue. The question is: do we want to extend the exemption to anyone who puts that hat on, whether they really put it on or not?

CHAIR—On this point, Mr Halprin, I understand that there are some arguments from the panel about whether we should go down this track or not. What I would like to do is explore your options so that at least we have teased out your options. We may or may not agree with it in the end but at least can we explore that?

Mr HALPRIN—Sure.

CHAIR—As I understand it, in your paper you have, in a sense, two options. One is to provide an exemption for a class of activity or for a class of person. If it is the class of person option then you can define the system administrator by their responsibilities or define them according to membership of some recognised body. Do I understand that that is your schema?

Mr HALPRIN—If we are walking down the exemption road then that is what I saw as the way to achieve that end.

CHAIR—Can I start with you as you have put some options forward. Which is your preferred option?

Mr HALPRIN—My preferred option would be the class of activity, for the very reason that a lot of people do not even realise they are system administrators and they should not be in a position where they are infringing the law for just doing their job of looking after computers.

The person who fixes your printer does not think of themselves as a system administrator. If they are doing work in which there is clearly no intent to infringe copyright, and they are hopefully merely doing a professional job of looking after those machines, whether they are a member of us, the Australian Computer Society or whether they are not a member of any of them, they should still be protected because they are not actually doing anything wrong.

So our preferred position would certainly be by class of activity because that seems to be the morally correct approach. Again, this is where we are coming down to this notion where it really does come back to intent. Where what you are doing is managing a computer network or host, or security of any of those things, the default should be that you are not intending to infringe. Then the onus is to show that you are actually intending to infringe. It

should not be read as, 'Gee, you're doing something with a circumvention device; it must be bad.'

Ms ROXON—But your proposed amendments under method 1 that you are talking about now—the class of activity—do not really go as far as that. You say it should not apply to these things, but you do not add the proviso 'provided there is no intention of infringing copyright'.

Mr HALPRIN—Because if you infringe copyright, you are still nabbed under the act, anyway, because copyright still exists on a work. So if you do make an illegal copy, then you can be prosecuted—full stop.

Ms ROXON—If you make an illegal copy in the course of doing these things that you are trying to exempt, you would not be breaking the law if your proposal was accepted, because you have actually provided an exemption for it. So you need to cover that.

Mr HALPRIN—Okay, you have found a flaw.

Ms ROXON—This is why we are having these sessions. Presumably you would not have any objection to the wording that you put saying 'provided the intention is not to' or 'provided there is not an infringement—

Mr HALPRIN—Absolutely not. Again, our intent is to protect people who are doing the right thing. If those words are too broad and it provides an out for people to actually make illegal copies when they were intending to make illegal copies, then that should be caught. I am not disputing that for a second.

CHAIR—Would anybody else like to comment, at this stage? I am just looking at the different proposals put forward. We are not ruling out whether or not we have them. We are just trying to look at which one would be the best if we were to go down this path.

Mr METALITZ—I note that the method 1 language does refer to the use of circumvention devices or services. It creates an exception for certain uses. The problem is that, as the bill now stands, the use of a circumvention device or service is never outlawed. So this exception is unnecessary to the bill as drafted. If there were a general prohibition on the use of circumvention devices and services and this were an exception to that, then I think that would be a reasonable starting point rather than opening the door to the making, importation, supply and communication of devices and services.

Mr CADMAN—That does not make sense to me. Why is that wrong? You are shaking your head. Why is that proposition wrong—a prohibition on devices with exceptions granted? You are shaking your head. You do not agree with what was just being said?

Mr HALPRIN—I agree with what they said; what you said was different from that, though. I have no problems if that is the way the committee wants to move forward—to have the general prohibition with exceptions, and that is either on the use or on all of the aspects of the life cycle of it. What I was nodding my head for is that he has picked up on one word in that which is the tail end of the life cycle. What clause 1 says is that it does not

apply to the making, importation, supply, communication or use. So that clause is meant to apply to the entire life cycle of the circumvention device where it is being used for the investigation of defects of technical protection mechanisms or where it is used in the course of system management.

Ms ROXON—Doesn't this also come back to the question I asked initially which was about what a circumvention device is and that the use of a circumvention device might actually be its communication initially? There is a bit of a blurring of the line of where that will be.

Mr HALPRIN—Yes. And the point you raised earlier is a very important one. One of the things that may happen is that there may be inadvertent illegal copies made. In fact, one of the other issues we talk to later is the fact that, as the act stands at the moment, every company that has computers basically breaches the act every day because, every time it takes a backup copy of the system, all of those copyright works are illegal copies. The exemption that is in the act applies only to computer programs; it does not apply to all copyright works. One of the things at the tail end of our submission is 'please add this', which allows for those incidental copies that are part of a normal backup regime for data security to be exempt.

Mr GONSALVES—I have a point on that. In relation to use, I would like to emphasise that use is very different from importation and supply. The problem with broadening the exception to the importing, supply and manufacture of these devices is that it then becomes virtually impossible to enforce in practice, because you have to prove essentially that that person is supplying the device for a prohibited purpose. In practice, that becomes a very difficult enforcement issue, which is why, I think, the focus, as Steve Metalitz said, should be on use if we are creating exceptions.

CHAIR—How does the United States legislation or the proposed European legislation deal with this? It seems to me, as a matter of practical commonsense, that the general issue raised by Mr Halprin is that the whole system is going to fall down if you cannot actually fix it when these problems come along. So as a matter of practical commonsense we want legislation which enables us to fix problems that arise in the system. I do not hear any loud clamouring of disagreement against that, so it is a matter of how we do it. Given that computers and computer systems in the United States are no doubt subject to the same defects that arise in Australia, I am interested in how this is dealt with elsewhere.

Mr METALITZ—The US legislation does have an exception for security testing—it is section 1201(j)—and I would be glad to leave a copy with the committee.

CHAIR—That would be useful.

Mr METALITZ—It goes primarily to the issue of use; in other words, to the act of circumvention. There is a general prohibition in the US law on the act of circumvention of access controls, and it makes an exception to that for an act of security testing—that is a defined term in the legislation. There are some factors that are to be considered in deciding whether or not a particular use of a circumvention device is for the purpose of security testing. It also allows the development, production and distribution of technological means

for the sole purpose of performing the acts of security testing, and this is where the concern about the life cycle of the circumvention device or service comes in.

Circumvention devices or services—as we are often talking about software here—are not limited to circumvention for a single purpose. If you can circumvent password protection, for example, we do not know of any technology that would allow you to circumvent password protection and gain access to a copyrighted work, but only for the purposes of security testing not for other purposes and not for simply obtaining unpaid access to that material.

So the problem with the life cycle of the product or service is that it is like a substance, let us say a dangerous drug, that may have a medicinal use in a very small number of cases. The question is: do you then allow the production, distribution and supply of that drug because it can be used in a small number of cases in a beneficial way? The US legislation basically tries to address this problem—and I would commend it to you for your consideration; it is obviously not the only way to approach this—by saying: if this is the only thing that you are doing with the circumvention device or service, if all you are doing with it is security testing and you are not violating any other law, you are not infringing copyright, then that is permissible. But it has a much more limited exception for developing or distributing and it does not create an exception to the general prohibition on making, distributing, importing, supplying and providing a service.

Ms ROXON—Mr Metalitz, if we go back to your original example, you were comparing this with having a skeleton key for your house—where you can go in, read the book and then it depends what else you do with it. You would not suggest, in that situation, that you would use copyright law to deal with the breaking and entering into your house—

Mr METALITZ—No, I am not suggesting that is—

Ms ROXON—Isn't that the point that Mr Wodetzki was making before, that really we need to look at it in a different way? I do not fully understand from your last answer how the US system deals with that problem.

Mr METALITZ—The US system deals with this problem by having a general prohibition on the act of circumvention of access controls. It is in section 1201(a)(i) of the US legislation. I think Mr Wodetzki says that what the treaties say is irrelevant. I thought one of the purposes of the legislation was to implement the treaties, so it is far from irrelevant. If you look at what the treaties say, he read the language: 'acts in respect of works that are not authorised by the right holder or permitted by law.' I think it would be very difficult to say that it is permitted by law for someone to use a skeleton key to get into your house or, in the technological equivalent, to decrypt, to hack into your system in order to gain access to copyright—

Ms ROXON—It is a bit circular when we are actually in the process of determining what the law will be.

Mr METALITZ—That is certainly correct, but the question is: do you want the law to be that it is all right for people to obtain access to material that they have not paid for access to or in excess of the permission that they have been granted to obtain it? Access controls

are an extremely important part of what copyright owners do to make material available. I do not think copyright owners—at least certainly not those who are in the business of producing and distributing copyrighted materials, which is the groups that I represent—are in the business of denying access to people. They want people to have access to their material. They want to have customers. They want to have listeners to the music. They want to have viewers of the videos. They want to have researchers and students and so forth having access to the research materials.

I think the Internet has maximised access—it has not minimised access—that people have to a lot of these materials. As part and parcel of that increased access, there is the need to manage and control access so that access is carried out in an orderly fashion. The fact that a copyright work has been created and placed in digital form does not mean that everyone has a licence to access it at any time, for any purpose, at no cost—even if they have to break through technological protections to do it. That is why access controls are such an important part of this picture.

CHAIR—Mr Metalitz, could I just ask you about the US section 1201(j). You say that the act of security testing is the exception. It seemed to me, Mr Metalitz, that what Mr Halprin was saying was that the activities of these system administrators goes beyond security testing. I am not wanting to put words into your mouth, Mr Halprin, but it seemed to me that you were saying that there was also, for example, some inadvertent copying which took place or some work which goes on in order to determine not only whether or not there has been some breach of security but also what happened then to overcome that breach of security. So my question against that background, Mr Metalitz, is: is security testing defined in some particular way in the US legislation, or is it understood that the related activities of these system administrators is contemplated by this exception?

Mr METALITZ—The US statute states:

. . . 'security testing' means, accessing a computer, computer system, or computer network, solely for the purpose of good faith testing, investigating, or correcting, a security flaw or vulnerability, with the authorisation of the owner or operator of such computer, computer system, or computer network.

So it has to be done with authorisation. The point was made that the owner of the computer or computer system may not be the same person as the owner of the copyrighted work that resides on the computer system. Although in many of the instances that my colleague was referring to, I think it would be the same person, or there could be some type of licensing arrangement that would allow for those copies to be made and activities that would otherwise be infringements to take place. This definition, which was worked out in the context of the US legislation, only addresses this issue. I do not know exactly how that maps to the concern that—

CHAIR—Certainly the definition, in making reference to correcting whatever else it was, seems to cover most of your concerns, doesn't it, Mr Halprin?

Mr HALPRIN—I would interpret that definition as very clearly targeted solely at the activity of security testing, which is one very small aspect of systems management and often not performed by the system administrators themselves—that might be performed by external auditors on commission of the system administrators. Any of the firms that perform security

testing are not the system administrators of that site. Again, one of our exemptions we are seeking is where it is with the authority of the system administrators, so that is if they commission an auditor to perform that audit.

The problem is that there are all of these activities that are not subjected to security testing. If I am changing file permissions on a part of the system to bring it in line with corporate policy, I have breached the act under the current wording, because here, where policy does not meet the decision of the copyright work, even though that copyright work may reside on an entirely different system, by law the copyright owner's definition would prevail, whereas it should be the system owner's policy that prevails. If the copyright owner does not like that, they should keep it on their own system.

Mr METALITZ—I am somewhat mystified by that example, because I would think that ordinarily in a corporate network most of the copyrighted material that resides on that corporate network is either created by employees of the corporation or obtained by the corporation under licence from the copyright owner for use on a computer network. In the first instance, the copyright owner and the owner of the computer system are one and the same; therefore obviously it could authorise circumvention of controls that it had put into place.

In the second situation, that is certainly something that could be handled explicitly or implicitly by licensing terms. If I am going to make material available to you for use on your corporate network, I must understand that your system administrator is going to have to check and make sure that two people do not have the same password or that there are no other problems like that that are going to interfere with the operation of the system. Ordinarily, I would think that would be encompassed in the licence agreement under which the corporation obtains copyrighted materials for use on its network.

Many of these issues addressed in this proposal and in others can and are being addressed every single day through licensing agreements by contract between copyright owners and their customers who are increasingly operating networks and putting this material on networks.

Ms ROXON—But those licences are not usually negotiated with the copyright owner.

Mr HALPRIN—This is a very important point. Those licences, or 99 per cent of them, are shrink-wrapped—that is, you do not even get to see them until you open the packet. In my 20 years in the field I do not know of a single licence that provides for corporate policy. So I think the suggestion that those things can be handled by licence is not a recognition of real life.

Mr CADMAN—Excuse me, maybe I have missed something, but a large corporation does have a very definite agreement as part of a licence. Parliament House, for instance, would have a very specific licence agreement. The shrink-wrap thing you referred to is my going home and putting it on my home computer. Aren't we confusing things here?

Mr HALPRIN—No. If you purchase a copy of Microsoft Word and put it on the PC here and it is paid for, appropriately, by Parliament House, the terms of the licence are Microsoft's terms, not yours and not Parliament House's.

Mr CADMAN—No, I use the Parliament House system; I do not put anything in my own computer.

Mr HALPRIN—Okay. But if you had full authority—and this is how most businesses work—to go down the road and buy some project management software and put it on your machine—

Mr CADMAN—I think your proposition is that if I buy some software and put it on the computer here and the system has a licence, you, as the systems manager, ought to have the right to break the code and fix something that has gone wrong with my software.

Mr HALPRIN—Yes.

Mr CADMAN—I think that is the point: I buy the software; it is my software on my PC that I use. The agreement is between me and the licence holder.

Mr HALPRIN—Yes, that is exactly the point.

Mr CADMAN—It is my private licence with him. There is a system operating above that and you, as the systems operator, need to get past my private software—

Mr HALPRIN—That is assuming it is your private software. If you were to purchase it on credit card or use a company cheque, the software has been purchased by the company. The company is bound by that agreement, not you personally.

Ms ROXON—Building on that, isn't what we do an even better example? Rather than buying our own software when we get elected and take over the office of the person we have defeated, Parliament House or DOFA or MOPS—or whoever actually runs the system—puts it in place. But Alan is the copyright owner of the speech he writes and saves on the computer. He does not have any agreement with the fantastic people on the help desk who save him when he accidentally deletes something or sends it to the wrong person or when something else happens and the staff cannot work it out. It is a silly example, but he has copyright of that speech or of whatever he has written. The systems administrator may need access to it, not for the purpose of trying to copy the speech—as good as I am sure it would be, Alan—but for the purpose of actually fixing some problem with it or some virus that it has.

MR HALPIN—That is a great example; it is exactly the right example. In Parliament House, the parliamentarians own the copyright in the speeches they write. The Parliament House IT department is responsible for keeping those machines running, including all the software on them. If Parliament House has purchased 100 copies of a word processor, each one of those is bound by the shrink-wrap licence, unless it has negotiated separately with the vendor. Some big businesses do negotiate separately with the vendor. If you are a Telstra you can negotiate directly with Microsoft for a corporate licence. But, generally speaking,

you will buy individual copies as you need them, or you will buy a small bank and you are too small for Microsoft to worry about. So you get the shrink-wrap licence and you open the packet. That is the licence you are bound by.

So Parliament House itself would be bound by that licence. That licence will have nothing to do with all these provisions we are discussing. My role as the Parliament House System Administrator is to keep those things running, to help you undelete files, to get the printer working, to work with those works that are your copyright ownership on the Parliament House's system.

Mr CADMAN—You are very close to that definition I am just hearing about. If the security of the system is going to fall over, you have a right under the US proposals to get in there and fix it. But you want to, by the use of the term 'manage,' do anything you want to do because 'manage' is very, very broad.

Mr HALPRIN—Absolutely, it is indeed very broad. If we had another three hours I could talk about what it involves, but the bottom line is that it is very broad. The simplest thing to say is that we are responsible for the integrity of those machines. You can read a very broad definition into the word 'security,' and often that includes confidentiality, integrity and availability.

Under that you could read a very broad definition of 'security', but in testing you cannot. If you have mailed your copyright work to someone else and there is a problem so that that has not been delivered and we have to go in and play with the system to get that mail delivered to resolve that problem, we have changed all sorts of permissions on the way quite possibly, irrespective of your directions and irrespective of Parliament House's specific policies perhaps, until we bring it to closure.

Ms ROXON—Is it not easier to look at your method 2 and provide the exemption to the class of person or the system administrator, rather than try to define the type of activity? That potentially goes some of the way to meeting the sorts of concerns that Mr Metalitz might have expressed. If you were dealing with that type of person, and provided there was some sensible way of defining who that category of person is, if you give the broad scope that you require to be able to make the system work but you still give the protection to everybody else from unauthorised use or—

Mr CADMAN—Your objection would be part (b) on that method 2—4A(b) would be the difference between you. I think that would be close to agreement on 4A(a) at the top of page 3.

Mr HALPRIN—Yes.

Mr METALITZ—Again, as to use, we would be, but this is our concern about the life cycle issue, that these circumvention devices or services are not just good for correcting security flaws. Once they take something that is protected by encryption and put it in the clear, it is in the clear for all purposes. Therefore, we would be very concerned about an exception to making, importing, suppling or communicating. But, as far as use is concerned, that is the point at which these exceptions become more relevant.

Mr CADMAN—Yes.

CHAIR—If you are going to allow an exception for use, you can only use something which has been made.

Mr HALPRIN—Exactly.

CHAIR—How do you deal with that?

Mr METALITZ—The US legislation allows it to be developed by systems administrators, or distributed for that sole purpose by systems administrators. There is a similar provision on encryption testing, but it is a much more limited exception rather than to say, 'Anyone who is making or importing, supplying or communicating a broad-gauge general purpose circumvention device or service falls within the scope of this exception.'

This really relates to the concern that we have in the copyright community about the entire permitted purposes defence which allows someone to simply say, 'I am going to be using this for a benign purpose. I am going to be using it for a purpose that is recognised in the copyright law and therefore I should be allowed to make, import, distribute a device that can do that but that can also do many, many other things that are not allowed by the copyright law.'

CHAIR—We will come to that as the next item, Mr Metalitz. What you are saying is that the US legislation divides making, importing, supply, communication and treats that in a separate category, if you like, to the use.

Mr METALITZ—Yes, that is correct.

CHAIR—Therefore, you think that is preferable because it allows a more precise definition.

Mr METALITZ—Yes. It is one thing to say, 'I have this device or service and I'm only going to use it for these purposes.' That is extremely difficult to police. It is extremely difficult to enforce. It is another thing to say, 'I have this device or service and I've used it in this way.' Does that particular use infringe anybody's rights under the Copyright Act? If it does not, I think it certainly makes sense to have an exception in that area.

Many of the problems that we have heard about this morning are really issues of substance of copyright law, not issues of circumvention. Parliament has addressed those issues with the legislation that has just come into force. It provided some exceptions with regard to computer programs for error correction, decompilation and so forth. That is really where these issues ought to be fought out, not on the question of whether someone can traffic in circumvention devices or services that do not just do that; they do that plus hundreds of other things.

Mr CANDI—I agree with the comments of Steven Metalitz. The problem that I think we have got with the System Administrators Guild's point here is that it is talking about section 116, which involves the remedies and infringements. But before we get there, we really need

to talk about what circumvention device and service is. Put that to one side for a minute because I think that is where we should go next. The point that the system administrators are making is reasonable, within limits, but to get there you have to add to section 116 the prohibition or the prescription on use.

What the system administrators are saying is that they need an exception—and it is a very narrow exception; it is really almost an adjunct to what the whole purpose of 116 is about—for their special environment, which should be narrow, and I think the US legislation that Steven has outlined gets to the narrowness of what it is about. But it is about the use.

We really have to go back to the beginning of 116 and get 'use' in there. We have got some paperwork on that today, which is hardly surprising, I suppose. Once you have got that in there, you provide this very specific—and it needs to be limited—carve-out for these system administrators. Plus, you have to recognise the other point, which is that the decompilation legislation, which has already been passed by parliament and is already part of the Copyright Act, has already empowered a lot of the job that these people are saying they want added to 116.

If we look at it in those terms, there are a few steps there. You have to get 'use' into 116, but before that we really need to go back to the definition of circumvention advice and service and effective technology measures and get those right. Unless we get those right, this section will not work properly, anyway.

Mr GONSALVES—It may help to clarify the point if I can ask Mr Halprin something. He started off by saying that this is the fundamental problem because from the time this bill is enacted, his members will be in breach of this law. Can I ask whether his members, on a day-to-day basis, are manufacturing and dealing in circumvention devices or whether they are using or circumventing.

Mr HALPRIN—I was going to speak to that anyway, so thank you. First of all, just to comment on the computer programs bill, that bill only provides exemptions for the 'duplication or creation of a modified work based on'. We are not talking about doing that at all so the bill does not apply to this discussion. We are not talking about, in 90-something per cent of the cases, the actual duplication of any works. Specifically, this is about the fact that we are not duplicating works.

On that issue, the important message I would like to get across is that we are part of a global community. Something in the order of 0.01 or 0.001 per cent of the Internet community are the bad guys, but that becomes a significant community when you magnify it by the size of the Internet. They are communicating. They are doing what they are doing to breach various security tools, whether it is to infringe on copyright or not. Unless we are also communicating and doing likewise to protect our systems ahead of that, we are only making ourselves vulnerable, and putting ourselves in exactly the place they would like us to be.

It is imperative that we are able to openly communicate about these security issues. One of the documents I distributed in the last month was the SANS October digest of security flaws reported in the last month. That is only the tip of the iceberg because that is only a

digest of the flaws that vendors have published patches for, not the ones for which we have worked out workarounds. It is not the ones that we have found, but just the ones that the vendors have, firstly, admitted to and, secondly, developed an official workaround to. An example are 14 Microsoft problems in the last month.

CHAIR—Mr Gonsalves's question, as I understood it, was: are you in the business of manufacturing circumvention devices or using them?

Mr HALPRIN—Under my understanding of the definition, we are every day. Part of our job is to automate. It is the only way that we can look after 1,000, 2,000 or 3,000 machines.

CHAIR—Mr Wodetzki, I am going to suggest moving on because time is of the essence.

Mr WODETZKI—I want to make some quick points on that in particular. I understand that systems administrators may make their own programs from time to time and share them with their colleagues as tools and devices. That is manufacturing. In any case, if those things are not manufactured and supplied and imported, then they will not be able to do their work.

Secondly, on the use point, there has been a lot of overlooking of the ban on circumvention service. A lot of the time when they use a device they are providing a service and that is banned. I think those things may have been glossed over a bit in the early discussions.

Three quick points have arisen out of a lot of this discussion. The first one has been looking to the US example as the way to go. I would caution against that. There is no reason you cannot go down the US approach of crafting a whole lot of exceptions. It is just that you will end up with what looks like about nine pages of dense text covering a whole raft of things. I could go through and list them but I will not. It is not just security testing. It covers things like encryption research. It covers reverse engineering. It covers being able to modify protection measures to disable things that would invade your privacy. It covers a whole range of different things.

It strikes me as a fairly inelegant solution compared to the one that has been put in this bill which, in the original exposure draft, created a link with infringement. I guess that is why we prefer the approach of, if you have a link with infringement, you do not get into that problem. If you go down the path of saying which ones should be specific exceptions, you are effectively saying that, even though you are not infringing sometimes, it is okay for those rights to be done away with technologically.

I can give you another example. Duncan Kerr raised earlier the question about: what is the problem by way of exception? I can give you a really good one in relation to public domain material. Fifty years after the author passes away, the author's work goes into the public domain. That is part of the copyright deal. You get a limited period of protection and then it goes out to the public to enjoy. If there is no exception to permit you to get at public domain works, it will mean that all copyright owners can lock up their material technologically and, even though the copyright has expired, you cannot get access to it because it is now locked up. You might as well do away with the public domain if you

introduce this law without an exception and without the link to infringement because nothing will ever come into the public domain if they choose not to let it.

One final point: we do not currently have any laws against circumvention, circumvention devices or circumvention conduct and, although there is a piracy problem, I do not think it is quite on the scale that may be being presented here. We do not have these laws now, and the last time I looked the sky had not fallen in. It really does seem premature to be going with the sort of boots-and-all approach of getting devices off the street.

Ms ROXON—But that is not really right, Mr Wodetzki, is it? We already know that there are extraordinary copyright breaches and we do not have a capacity to properly enforce them. That is why we have got at the same time an inquiry going on about enforcement procedures for copyright that is not specifically directed at this sort of technology. But I think Mr Gonsalves's point before was that one of the few ways of trying to ensure that you do not have extensive abuse of copyright is to make sure that you do not let people have the tools that assist with that, and I can understand that point. I am not sure how you get around the very legitimate problems I think Mr Halprin is raising.

Mr WODETZKI—I agree with all that. I was not suggesting that we do not have a problem. I was just suggesting we have had a problem. We have always had a problem with piracy and it may be increasing but it has not, at this stage, done anything to destroy these industries. These are very profitable industries still, as far as I am aware. Piracy has always been something that I know is bad and is hard to enforce. Anything we can do to improve enforcement without upsetting certain public interest principles is good and we would not oppose these new technological protection measures. We simply oppose them where they start interfering with legitimate activities.

CHAIR—I think we can continue to go round and round on this specific issue. Perhaps if we go to your proposals, Mr Candi, which will open up the broader question and the one which you say is underlying it. I am sure there will be some discussion about that. Can I just say timewise—and this is always the curse under which we work—we would hope to finish this first session by about a quarter to 12 so we have got an hour and a half for the second session.

Mr CANDI—Thank you, Mr Chairman. Earlier on we handed up three bundles. There is one that starts with copyright amendment, and then underneath it has got item 4, subsection 10.1, then it goes to the definition of circumvention device and circumvention service. We could start with that and then we will move to the second one which deals with 116.

CHAIR—Mr Candi, just to help us, what is the page number at the top of the page we are looking at now?

Mr CANDI—It is page 1, but it does not actually have page 1 on it, but the next one does have page 2 on it. So I am looking at the first bundle. It is a two-page bundle, and it deals with item 4, subsection 10 circumvention device as the first subject matter it deals with. The last time I was in front of the committee, we did make an undertaking that we would try and do the circle of the copyright community. You will note on the footer of this that a range of copyright industries has seen this and agreed with it. We have agreed

amongst ourselves that the best person to talk about where we are going with this definition of circumvention device and circumvention service and effective technological protection measures will be Steven.

As an overview I would say this: the definitions that are in the act are narrow. They do leave out certain very important elements. And, indeed, we have a significant problem with the words 'limited commercially significant purpose' that was used in the act, but rather than try and rebuild the whole thing, we have left that in there. We have built on top of it, although ideally we would have liked those words to have been removed as well. Having said that, I will pass it over to Steven.

Mr METALITZ—Thank you very much, Mr Chairman. With your permission I will just briefly summarise these amendments that are really on the first page and a half of the material that Mr Candi has referred to. In terms of the definition of circumvention device and the parallel definition of circumvention service, there are two main changes here from what is in the bill as it now stands.

The first is to make it clear that a circumvention device does not have to be simply the overall package. It does not have to be a device as a whole; it can be a component of a device or it can be a part of a computer program. I think increasingly the distinction between hardware and software is very much blurred in this area and most of what you could do in a device that has a semiconductor chip in it, you could also do in software form. It is important to be able to get at the component or the portion of the computer program that actually carries out the act of circumvention.

The second main change that we propose to the definition of circumvention device or service, as Mr Candi has already referred to, is to recognise that there may be more than one way to identify an illegal product and an illegal service when you see it. The test of limited commercially significant purpose or use is certainly one important way of determining whether or not a device ought to be banned. If it is not good for much else other than to strip away encryption, hack through other protections, circumvent copy controls and so forth, then it certainly ought to be banned.

But you may also find other evidence that indicates that a device or service should not be produced or imported, and those are set forth in (b) and (c) of the definition of both device and service—they are essentially the same.

The (b) provision—the second test that could be used—is whether the device or service is promoted, advertised or marketed for the purpose of circumventing a technological protection measure. A device may do several things but if its manufacturer chooses to sell or market it—as all of us have seen with broadcast decoding devices, pirate smart cards and so forth—as something that will allow you to gain access to material that you cannot otherwise have access to, then I think it is pretty clear what the purpose of the device is.

The third category, which is listed in (c), is if you have evidence that, again while the product may do more than one thing, it is primarily designed or produced for, or it has primarily been adapted for, the purpose of circumvention, then certainly this is the kind of

device or service that should be covered by the legislation and whose manufacture, distribution, importation and so forth ought to be banned.

This three-part test really has three options—three different ways that the copyright owner or whoever is bringing a civil action, or the prosecution in a criminal case, could prove that a particular device or a particular service is in fact a prohibited circumvention device or service. The second amendment to item 8, beginning down at the bottom of this first page—

Ms ROXON—Sorry, Mr Metalitz. Could I just interrupt you for a brief moment? It may be pedantic but I just want to be sure that it is right. In (b) and (c) your draft has just 'effective technological measure'—I assume you really mean 'effective technological protection measure' and you are talking about those?

Mr METALITZ—You are absolutely right. That is a mistake.

Ms ROXON—I just wanted to make sure there was not some subtle difference that I had missed on this.

Mr METALITZ—I am sure that that will not be the only mistake in this drafting, but I hope we will have the opportunity to present you with a cleaned up version of it.

Ms ROXON—Sure. There is no problem; I just wanted to check that was what was intended.

Mr METALITZ—And I apologise. As I said, I think there may be some other errors as well, but we will try to get those clarified as quickly as possible. The material on item 8 beginning at the bottom of the page really gets to the point that I was making earlier about the two different types of technological protection measures that are important in this environment and that need to be protected. Those are set forth in (a) and (b) up at the top of page 2.

Access control technology is something that controls access to a work or other subject matter in which copyright subsists. I would just mention that, as far as the public domain point is concerned, if the technology is protecting public domain material then it is obviously not covered here because that is not a work or other subject matter in which copyright subsists. There would be no prohibition on circumventing that protection anyway, if it is public domain material.

As a practical matter, I am not sure that is likely to happen because most public domain material has been around for so long that there are many copies of it, and the idea that someone would be able to monopolise all the copies of it and put technological protections on those copies and prevent access to it I think is rather far-fetched.

CHAIR—Isn't Mr Wodetzki's point, though, that this would preclude material ever becoming public domain material if you can lock it up technologically?

Mr METALITZ—If a recording is produced today and over the next 50 years no copies of it get into anybody's hands except the sound recording producer's hands, if at the end of those 50 years he puts encryption on it and prevents people from accessing it, then I suppose that is correct. I think that scenario is rather far-fetched because the material will be out there in many people's hands at that point. Again, the motivation of the producer, whether it is of a sound recording or software or any other kind of copyrighted material, is to disseminate it. As far as the commercial motivation is concerned, it would have to be to disseminate it and have customers—not sit on it for 50 years.

CHAIR—So unless it is the unplayed tapes of the Beatles' first recording session or something like that that nobody wants to disseminate, you are saying that the objection Mr Wodetzki is raising is really unfounded?

Mr METALITZ—I think so. That gets into some other issues as far as performers' rights vis-a-vis the producer are concerned, but I think it is difficult to see the scenario in which this is really a practical problem.

The amendment does break down between access controls and entry controls. Password protection would be an example of access controls; so would encryption. As well, I think, it is important to recognise that there are many ways that copyright owners are increasingly using other means—not to deny access to copyrighted materials, but I would say to manage access to copyrighted materials. It is quite common now for software, for example, to be marketed on a test drive basis—you can use it for a certain period of time and at that point your access expires. That mechanism for allowing you to access it for a limited period of time is a technological protection measure, and its value as a marketing device, as a way of giving people a chance to try out something before they buy it, would be compromised if it were all right to circumvent that protection, or, even worse, if it were all right to go into the business of providing the service of breaking through that type of protection.

So (a) is access control, and (b) is what we sometimes call copy control, although that is a little bit misleading, it is a little bit too narrow. It is really managing the exercise of any right comprised in the copyright. So whether that is the reproduction right or the new communication right that this legislation provides, if there is a measure that works to control copying or to control the exercise of that right, then it should be protected against circumvention.

The last clause there specifies some of the means by which these protective technologies can be carried out, but I think I would encourage the committee to be very aware of the concern about inhibiting innovation in the development of technological protection measures because I certainly cannot sit here and predict a year from now, or five years from now, exactly how these protective measures will work. We can talk about them in general terms, but one thing we know is a constant in this field is technological change. So it is important not to have definitions that are too bound to today's technology, but instead, definitions that allow for the development of other means that are effective in either controlling access to the work or in controlling the exercise of rights in the work. So that briefly summarises the two amendments that Mr Candi referred to.

CHAIR—Thank you. Any comments about them? I understand the comments, Mr Wodetzki, that you made earlier about access. We will take them on board; you do not need to repeat them. Any further comments? If not, let us move to the next suggestions you have, Mr Candi.

Mr CANDI—We are dealing with sections 116 and 132. I think we have all got it now—the top of the page numbered 3, Mr Chairman. Just by way of an overview, we have made quite a number of changes. The first one deals with section 116A. We have put in some paragraphs dealing with use, which was what we were talking quite a lot about a bit earlier. We can kick off with that. I will ask Steven to the left of me here to take you through this, and then I think a couple of us might add in some more comments, if that is all right with you, Mr Chairman. Thank you.

Mr METALITZ—The changes to 116A, again this is the basic civil cause of action against circumvention devices or services—and again with apologies in advance for any drafting errors we may have added into the process here. There really are two main changes here. One is to add the additional provision in 116A(1)(b)—the prohibition against use without the permission of the owner of the copyright—use of a circumvention device or service either to access a work in which copyright subsists or to exercise one of the rights of the copyright owners that subsists in that work or subject matter. Again it does not affect public domain material but it does cover both unauthorised access to works and unauthorised copying or distribution or transmission or communication of works. That amendment adds the use prohibition along with the importation and making prohibition.

The second main change that this amendment makes is to eliminate the exception for permitted purposes, and this is something we have already touched on earlier. As the bill now stands, as we read it, all of the prohibitions on importation or making or trafficking in circumvention devices or services can be trumped, totally trumped, and the prohibitions will be totally eliminated if the person who is receiving the device or receiving the service signs a piece of paper that says, 'I am obtaining this service for one of the specified purposes under the Copyright Act', whether it is for the purpose of decompilation, for library use, for use in an educational institution or for use in a government agency, and there are several others.

From our point of view this is a huge gap in a provision that is intended to be an enforcement provision. It would make it almost impossible to enforce. It would quickly become routine for anybody trafficking in these materials to have their customer sign one of these pieces of paper. It would become part of the shrink-wrap, if you want to look at it that way. Many people would not even read what they were signing, and there is absolutely no way to enforce this declaration. There is particularly no way to enforce it because what the declaration says is, 'I am only going to use this device or service for particular purposes'—and recall that under the bill as it now stands, use of the circumvention device or service is never illegal, so it can be used without any liability for any purpose.

Therefore, the fact that there is no penalty for making a false declaration and the fact that the activity that the declarant is forswearing is not illegal under the act, I think together combine to make it clear that this is simply going to be a piece of paper. It is not going to be any type of effective enforcement mechanism for preventing the development of a

market—what I would call a black market—in circumvention devices or services. Everyone who gets one will sign this piece of paper and that will be the end of it. These devices and services will be plentiful in the market, and it will be impossible to put the genie back in the bottle.

CHAIR—I understand what you are saying there, Mr Metalitz. What is your proposal in relation to what is now legitimately covered by permitted purposes?

Mr METALITZ—As it stands under the current bill, this is a total defence to any liability for making, importing and supplying circumvention devices or services, and we think that is inappropriate and will make it impossible to enforce those prohibitions.

I will say where this could come in—where I think it would fit more appropriately—is if there is a general prohibition on use of circumvention devices or services, there could be some provision made for those instances in which the circumvention device or service is used for particular types of purposes—and we have talked about the security testing. Obviously there will be differences of opinion about some of these, but it is one thing to have someone sign a piece of paper saying, 'This device can be used for many purposes, but I will never use it for any but the purpose.'

CHAIR—I understand that. I am just asking, in your proposed amendments, do you actually take us to the latter—namely, the list of permitted purposes as exceptions?

Mr METALITZ—No.

CHAIR—So that is not part of what is here?

Mr METALITZ—No, that is not part of what you have before you.

CHAIR—Would you agree with me that if we go down the road that you are proposing, then we would need to also have this list of exempted permitted purposes?

Mr METALITZ—I think you certainly could consider doing that if the concern is that there may be some circumstances in which people should be able to circumvent technological protection measures, as long as the market for these devices is not created and fostered on the theory that people are only going to be using it for these permitted purposes. I do not think we can say that there is never a circumstance in which it is appropriate.

Ms JULIE BISHOP—So you would have a general prohibition and then list the exceptions?

Mr METALITZ—Yes. I would certainly think that is a preferable approach to simply providing this blanket immunity for anyone who signs a piece of paper that says, 'I will only use it for specified purposes.' Then it gets much more specific; you are looking at a particular purpose. Someone has a circumvention device or service, they use it in a particular way. What did they in fact use it for? You are looking at factual questions, not questions of intent.

Ms JULIE BISHOP—You were talking about the inadequacy of it because people will make false declarations. If you have a list with a general prohibition and then a list of exceptions, why wouldn't people just continue to say, 'I'm using it for one of the list of 25 exceptions'? It is still a false declaration.

Mr METALITZ—Because then it would be a factual question of how was this device or service in fact used, and you would have to look at the particular circumstances that were involved, rather than, in advance, forswearing any of these uses and letting that be a complete defence.

Mr CANDI—We are tackling head on the issue of the exemption for permitted purposes. Now there is someone here from the libraries, and I am sure that they can put up their side of the story. But, in talking with the copyright communities, this perception and this argument that I think fell on pretty hollow ground earlier, that there are a whole lot of libraries or whatever that need to be able to just circumvent protected communications because they will never be able to get the work, I just cannot see how there is an argument there. From the copyright industries, given that the commercial copyright industries' whole reason for being in business is to make and sell things, in this case it will be by selling a communication or a subscription to a communication service to get your journals or your recordings or whatever.

I am finding it hard, and I would be grateful if anyone could clarify it, to understand why we need to provide in this legislation that, say, libraries can circumvent a protected sale, get around a protected sale when, if a library subscribes to the service, or one library subscribes to the service—it appears to me that once one library has got a legitimate copy there are provisions that deal with other libraries being able to get it off them—once someone has paid their subscription fee for their journal or, in this case, their online journal, and they are a library, why are we, in legislation, trying to give them the scope or the immunity from doing something that otherwise would be a prohibited act?

I suppose the argument is that there may be a rare occasion when someone does not make something available. But, in the commercial world, 99.99 per cent of the time the companies that we all represent are there to sell and offer subscription services. There will be exceptions but the exceptions cannot be the rule here. In talking to the book publishers and all the other copyright industries that I have spoken to in the last few days, that is the premise that we are putting forward here. That is why we have ruled out these permitted purposes. We have left in the bit about government for security or law enforcement and all that, and perhaps section 183, which I think is the government section, might survive for reasons other than to do with just commercial reasons. But we are tackling that head on and we realise it is a major issue with people who are involved in this roundtable discussion and indeed, Mr Chairman, with you and your colleagues. But that is where we are coming from.

Ms CAMERON—Under the National Library Act, the National Library is mandated with the responsibility for preserving Australian publications. The Copyright Law Review Committee, in its Copyright Simplification Act, part 2, has recommended the extension of legal deposit to cover digital publications and, in doing so, endorses the library's role in preserving these publications. From our point of view you cannot preserve digital publications unless you can access the full functionality of that digital publication. In doing

so, in terms of certain publications, the library will need to use circumvention devices to be able to preserve that publication.

We could actually archive or copy a digital publication without access to its full functionality—password protection or whatever—but in terms of migrating that publication to a new platform for preservation purposes or using emulation software—and migration and emulation are currently the two known ways of preserving digital publications, although both are largely untested—the library would not actually be able to perform its core business and neither would the state libraries who are also charged with the mandate of preserving Australian publications. So it is a huge concern to the National Library that we be able to access the functionality of digital publications. The Copyright Simplification Act part 2 may extend our rights but technically we will be prevented from preserving publications if we cannot access functionality.

Ms ROXON—I am not sure whether you are able to or are in the position to make any comments generally on the way that this change might have an impact on libraries other than the National Library when it is exercising its rights for preservation purposes. I am not sure whether you are able to or are interested in making some other comments about the library's concerns.

Ms CAMERON—We would probably defer to Jamie and the ADA on that.

Mr HALPRIN—Again, I should reiterate that I am not a lawyer so I may be slightly wrong in my interpretation. The entire point of the Copyright Act as it exists now is to protect the illegal copying, et cetera, of works. So the whole idea of adding use in is a bit superfluous because the use of the circumvention device is either used to infringe a copyright right, in which case there are already more than enough clauses to deal with that, or it is not—it is for some other purpose. So the point of codifying use seems to be superfluous to me.

Another point is that the changes suggested, specifically the tearing out of subsection 7, are effectively trying to unwind the recently passed Copyright Amendment (Computer Programs) Bill. That seems to me to be a questionable activity. Where subsection 7 refers to sections 47(d)(e)(f), 49, 51 and 83, it is basically seeking to unwind those rights that have just been granted in the recently passed bill, in my interpretation.

The other point is a more general one. The whole reason that these exemptions are codified here is that the government is recognising there are a number of unreasonable licence limitations copyright owners may put in place that are not good for the higher purpose such as preservation of records et cetera. This is entirely the reason that these things are codified, so that you are not relying on the goodwill of a particular licence for those rights. To me, the idea of 'Take them all out, and we will be the good guys', seems a little naive.

Mr WODETZKI—The copyright owners are saying, 'Trust us, we won't take away your rights. It is in our interests to publish work and make it available.' What they are not saying is, 'We will do that only if we get paid.' That is not currently what the Copyright Act provides. The Copyright Act provides for certain levels of access without being paid. The

question we are facing here, and the question that they are asking you to accept is: is that an optional position that they can do away with? That is exactly what these provisions are seeking to do, particularly with their amendments.

Ms ROXON—Mr Wodetzki, it would be helpful for us if you focus specifically on the amendments that you think have that effect.

Mr WODETZKI—The fact that they have now deleted any permitted purposes would tend to suggest to me that you can no longer get access to a circumvention device at all, ever. They would have us believe this change is really necessary to get these devices off the street. Then we are in the situation of, 'Trust us; we won't use circumvention devices to take away users' rights', when in fact they have pretty much said that they will because they want to be able to control access.

Access includes controlling certain uses. It includes controlling reading and all sorts of things that are not currently protected by copyright. They want to do away with the balance set out in the Copyright Act and establish their own balance technologically. I do not think they would even question that. I think they have said, 'We want to have access control, copy control and any form of control that we can think of that we want technologically.' Whether it is an infringement or not is irrelevant. We might as well not have a debate about what is an infringement and what is covered by an exception. That all becomes pretty much irrelevant.

If you accept that it is legitimate for copyright owners to decide at their discretion what rights users have, then that is fine. There is not much anyone can do about that. That is what the bill will achieve. But my understanding is that the bill is intended to maintain a balance and this is the tool by which that balance will be unilaterally rewritten on the 'trust us' mantra.

They have form. They use contracts already at every opportunity to set their own view about an appropriate balance. They will do the same thing with technological measures. It is a fundamental policy question of whether, under the veil of an enforcement provision, you allow a complete unilateral rewriting of rights of different parties under the Copyright Act.

We absolutely reject that it is what the bill is intended to achieve. The bill says all over the place, 'This is intended to establish a balance between the rights of owners and users.' They also say that, if there are any exceptions and devices get-out for any purposes, the market will be flooded with them or they will become a black market.

If they never do anything to override legitimate user rights, no user will legitimately be able to declare that they require a device for that purpose. If the rights management systems, access control systems and copy control systems they set up are not set up in a way that tramples over user's rights—and I am assuming for the time being that we think they are legitimate—then they will create a legitimate market for circumvention devices because they have sought to take away rights from people who previously had them.

Our view is that the only effective way of discouraging copyright owners from trampling on users' rights is to have lurking in the background the possibility that people can get hold

of devices in certain circumstances. We do not mind there being restrictions on the availability of those devices so that you avoid some of the doomsday situations that have been presented, but we think the devices should be available when rights are being taken away.

Ms ROXON—Mr Wodetzki, I do not think we need to go back over the things that you have put to this committee on a number of occasions before. Presumably that depends on what happens in respect of the provisions that relate to access, not just the provisions that relate to circumvention devices.

Mr WODETZKI—If you do not accept our position that there needs to be a direct link to infringement, then we enter the debate about some currently lawful activity being capable of being overridden. We have to have a debate about which currently lawful activity under the copyright is capable of being overridden and which is not. We have not really had that debate. I suspect you are going to have to go through each and every one of the exceptions and each and every other means by which lawful access, including public domain access, is provided. You will have a very long debate about, 'Yes, that is an option' or, 'No, that is a must have.' I do not know that the committee has the time for that but that is the way we are heading. We can put our views to you on must haves, but our starting point is that if it is not infringing it should not be overridden.

Ms ROXON—Could you give me an indication of who else wants to comment on this aspect? I know we still have another set of provisions. Mr Metalitz and Mr Gonsalves, do you have some more comments? We might just take those and any questions and then we will move on to the next set if we can.

Mr METALITZ—I will comment very briefly. I think Mr Wodetzki's apocalyptic vision that he has just laid out depends upon a confusion between—

Ms ROXON—We have a competition for the greatest apocalypse. We just do not know which direction it is coming from.

Mr METALITZ—I would disagree that the Copyright Act in Australia or elsewhere dictates that users have a right to access without pay. Are the publishers, for example, obligated to provide a free copy of every work to every library, every government agency or other category of user without getting paid for it? All of the exceptions in the copyright law, none of which are affected by any of this, presuppose lawful access to begin with.

Once a library has acquired a copy of a work, what can they do with it? What copies can they make of it? How can they share it with other libraries? How can they share it with their users and so forth? Nothing in the copyright law says that they are entitled to access to every work, regardless of the terms and conditions under which commercial publishers operate, in order to try to make their works available.

As a practical matter, one way of getting at this question would be to ask Ms Cameron, when publishers have been approached about making available the full functionality of their works so that preservation activities could be carried out, how widespread the problem has been. Have publishers routinely refused to allow access to that functionality and frustrated

the rules of preservation, or is this more of a speculative concern about what might happen in the future? In its oversight, this committee can stay attentive to it.

Ms CAMERON—With current Australian web publishing, online publishing, 99 per cent of it relates to the production of gratis materials through the university sector. There is a lot of home publishing and so on. Australian commercial publishers are not publishing online in Australia at the moment simply because, I suspect, the market is not there. There really is not a market for Australian e-journals at the moment.

So our negotiations to date have been limited to publishers in the university sector—academics, home publishers, web publishers who have come on to the scene who have not had any experience in the print environment—and the use of protection measures by those sorts of people is very limited. To date, it has usually been to protect culturally sensitive material, for example. That is something that we have recently dealt with. But there is no doubt that, once Australian commercial publishers move into the web publishing scene, they will use locking devices with their commercial material. I do not think there is any question of that.

Mr METALITZ—I think the question then would be, 'What are the circumstances under which publishers would refuse to give access to this material if they used these protection devices?' I agree they might well use them in order to promote the development of this market so that they can manage access to it and not simply make their materials available to all comers. What is the likelihood that they would then turn around and refuse access to the library for preservation purposes? I think if that becomes a problem, it certainly is something that the committee could respond to, or that the parliament could respond to, but I suggest, as Mr Candi did earlier, that it is extremely unlikely to become a problem.

Mr GONSALVES—Ms Roxon made a comment which I thought was very striking indeed when she referred to the competing apocalypses. When you look at the two apocalypses you will see that one is a real apocalypse and one is an imaginary apocalypse. The real apocalypse is the huge scale of infringement of copyright in this country and, in fact, worldwide, as evidenced by our submission to the enforcement inquiry where 30-odd per cent of software in use in Australia is illegal.

You have also got a situation where, in trying to enforce that copyright over a number of years, every single time a copyright owner has introduced a copy protection mechanism to protect their software it has been broken by pirates, and the devices to get around the copy protection has been sold, advertised, by people dealing in those devices.

As against that real apocalypse we have an imaginary apocalypse, a situation where copyright owners are going to lock up their works and prevent people from having access to them for legitimate purposes. I have not seen a shred of evidence that that is the case. That is why I think the balance in this bill has to be towards protection and enforcement of copyright. If a problem emerges down the track that copyright owners are being unreasonable, then legislation can be introduced. As Mr Kerr said earlier on, copyright amendment bill No. 749 can be introduced to deal with the problem.

I think that that position is also reinforced by developments overseas. In the US and in Europe there is nothing suggested in proposed legislation there which goes anywhere close to the sort of regime which is being considered here, which would make enforcement so difficult. There have been limited exceptions in the US act and limited exceptions proposed in Europe as well.

Ms CAMERON—Can I respond briefly to a point made by Mr Metalitz? The National Library would not expect to have to negotiate individually with publishers on every digital publication that we acquire under legal deposit, and I think that is really what he is suggesting we would have to do if we were not able to use circumvention devices to unlock effective technological protection measures. I think that is a really impractical and unrealistic suggestion. We would expect, once that legal deposit was extended to the digital environment, that we would not have to negotiate individually on the receipt and management of every title that we acquire. It would be impossible in practical terms to do so.

Ms ROXON—But, Ms Cameron, wouldn't it be a lot easier to deal with your concerns by making a specific exemption for the National Library than necessarily changing the whole regime of enforcement procedures?

Ms CAMERON—Yes. I am not arguing for that. We really see it as a significant concern that at the moment, under the permitted purposes, preservation is not one of those permitted purposes.

CHAIR—We probably need to move on to the last couple of issues, given the time. We have also got the temporary copies item, and any other comments in relation to—

Mr CANDI—Are temporary copies scheduled for today or tomorrow? I thought it was tomorrow. I think it is on the Friday timetable, from memory.

CHAIR—It is tomorrow.

Mr CANDI—In relation to section 116—

CHAIR—Before you do that, there is also the question about the extent of the permitted purposes provisions, which there may be some comments about as well.

Ms ROXON—We have sort of been dealing with that.

CHAIR—We have been doing that partly, but maybe there are some others.

Mr CANDI—In regard to section 116B, which in our document starts on page 5 and then goes over to page 6, two minor changes are suggested. The first one we did not put in. In paragraph (a) at the top of page 6, that paragraph starts by saying 'a person removes or alters any electronic rights management information'. After the word 'alters' and before the word 'any', we would wish to have the words, 'or authorises the removal or alteration of', just to make that section more complete about the conduct of doing it yourself or organising for someone else to do it.

In subparagraph (c) you will notice we have included the word 'intended', as indicated by the fact that it is underlined. We request that because it expands the section to cover the fuller areas of what the knowledge requirement is. It is about going to the evidence or going to the person's aim. Was it to facilitate or conceal the infringement? We have added that same word, 'intended', into subsection (3) of the same provision, namely 116B. They are pretty simple amendments but they help to make them better business.

Ms ROXON—Why have you removed 'or licensee' from (b)?

Mr CANDI—Mr Gonsalves can speak to that.

Mr GONSALVES—If we simply have 'the owner or licensee', that gives a very broad category of people who can bring an action which may or may not be with the licence of the copyright owner. To take an obvious example, Microsoft Windows, there are a large number of licensees of Microsoft Windows out there and we would not want every one of them to have the right to bring an action in relation to these circumvention devices. That is the reason why we are suggesting that that needs to be changed.

Mr CADMAN—That imposes a very centralised control. That imposes a very centralised control beyond what would be a reasonable legal responsibility. If you licence somebody you trust them. They have got the power the owner has got.

Mr GONSALVES—But that is not how the act currently works. The way the act currently works is that the rights of action for an infringement of copyright are granted to the copyright owner, or the exclusive licensee of the copyright owner.

Ms ROXON—Are we talking about a different provision here? I am looking at section 116B(1)(b) where you are deleting 'or licensee' from being a person who can provide permission; I am not talking about section 116(2) which allows an owner or licensee to bring an action, and remains unaltered in your amended copy.

Mr GONSALVES—I am sorry, there are two separate points there. You are right. The subsection (b) that you are referring to has a separate and related point. To give the Microsoft Windows example, any user of Microsoft Windows could potentially grant permission to someone to overcome a circumvention device.

Ms ROXON—Presumably only if it was within the terms of their licence.

Mr GONSALVES—It does not say that.

Mr CADMAN—That is a problem for the owner.

Ms ROXON—Isn't that all a licensee is permitted ever to do under the general law? They are not suddenly given all sorts of other rights of the owner. You probably do need to clarify that for us because the copy that I have of subsection (2) leaves 'licensee' in there. It actually says 'the owner of licensee of the copyright'. I presume it is meant to say 'the owner or licensee'. Maybe it is meant to have that deleted, but you need to tell us what it is you are putting to us with that.

Mr GONSALVES—It has not been deleted in the draft that you have. We have a separate proposal there. Do you want to deal with that subsection (2) first?

Mr CADMAN—I am dealing with subsection (b) at the top of page 6. Is that right?

Mr GONSALVES—Yes.

CHAIR—Your concern is that any licensees of Microsoft product could give permission which would then open up—

Mr GONSALVES—The floodgates.

CHAIR—the floodgates.

Mr GONSALVES—That is correct.

CHAIR—But the contrary view put to you is that they could not legitimately, legally or lawfully give permission if it is beyond the terms of their licence.

Mr GONSALVES—I think that that is not the wording. The wording simply says 'without the permission of the owner or licensee'. So if you are licensee of the copyright, I would interpret that as saying that you can authorise anybody to remove rights management information.

CHAIR—But surely this cannot override the licence agreement.

Mr GONSALVES—But licence agreements do not normally deal with this issue, in my experience.

Ms ROXON—I am sure the example of Microsoft would be one where we could be 100 per cent certain that it did deal with that.

Mr CADMAN—Give permission to copy or provide copies—if the licences do not cover that, they are not worth the paper they are written on.

CHAIR—This seems to me to be taking a sledgehammer to crack a walnut, Mr Gonsalves.

Mr GONSALVES—I think not, for this reason: the way the Copyright Act works is that the prohibition on infringement on reproduction, in section 36 for example—if you have a copy of the act—talks about reproduction with the licence of the copyright owner. It does not talk about the licensee. Again, it is for that reason. It is only the copyright owner that can authorise, whether directly or indirectly, the exercise of the rights comprising the copyright. This set of provisions really should be no different from that basic fundamental regime under the Copyright Act.

Ms ROXON—I think we understand what you are saying.

Mr GONSALVES—I am not sure that this is a controversial point, by the way, because it is simply reflecting what is already in the act in relation to infringement.

Ms JULIE BISHOP—In your amendment, you include the word 'intended'. As it reads without your amendment, it is a provision on knowledge—that the person knew or ought reasonably to have known. What scenario are you trying to catch by including intention?

Mr GONSALVES—Perhaps I could leave that one to Mr Candi or to Mr Metalitz.

Ms JULIE BISHOP—Sure.

Mr METALITZ—I would think that in a circumstance in which the defendant intended to enable, facilitate or conceal infringement, that that ought to be sufficient without having to prove what the person actually knew. For example, a person might be mistaken in thinking that this could do this, but if he acts with the intent to induce, enable, conceal or facilitate infringement, then it should be—

Ms JULIE BISHOP—But isn't that captured by 'ought reasonably to have known'?

Mr METALITZ—That is an objective test.

Ms JULIE BISHOP—Yes.

Mr METALITZ—And there may be circumstances in which objectively it was not likely to have that effect, if the person removing or altering the electronic rights information intended for it to have the effect. In other words, this would allow a cause of action to be brought even against someone who was tampering with a relatively robust electronic rights management system, an unsuccessful attempt, I guess, if I can put it that way.

Ms JULIE BISHOP—But if it is unsuccessful, where is the infringement?

Mr METALITZ—You still would want to stop someone, for example, from doing that or going into the business of attempting to do that because, as Mr Gonsalves pointed out, with every protective technology that has come down the road, someone has figured out how to break it. It is not always the first person who figures out how to break it. But if the other criteria are available here, it would make sense if you had someone as to whom you could prove that intent; it would make sense to include it.

Ms JULIE BISHOP—I have a real problem with that, a real difficulty with that: prosecuting intention without an objective.

CHAIR—It seems to me that you are wanting both subjective and objective tests there. Isn't the objective test sufficient?

Mr METALITZ—The objective test is more important in the sense that you obviously want to get at the circumstances in which they are taking some action in the knowledge that it would induce, enable or conceal, but I think there could be a circumstance in which they intend to so as well.

Ms JULIE BISHOP—Down the track in the actual prosecution of these sorts of things, I see enormous difficulties with intention being one of the tests, particularly where it did not end up, on any objective test, to have been a matter that they ought reasonably have known.

Mr CANDI—We will not seek to put this as one of our priorities and will gladly move on to the next section.

CHAIR—Yes, we can move on. I do not think we need any arguments to the contrary, Mr Wodetzki.

Mr WODETZKI—I have a problem with licensees.

CHAIR—Do you want to say something about licensees?

Mr WODETZKI—Yes. It goes to this clause and in fact to the previous clause where they have crossed out 'licensees', having previously argued, I might add, that the fact that licensees were covered addressed one of Geoff's concerns, and now they are taking licensees out. If you are the licensee of a system and you authorise someone to do something in respect of the system, that is not going to give rise to an infringement. Again, it is a little bit beyond me why you have to go and specifically get the copyright owner's permission when you are licensed to use the work and you just happen to be engaging in circumvention for some other legitimate purpose. If you are a licensee, it is not about infringement.

Ms ROXON—If you are a licensee and you are seeking to provide it to other people who are not, then it is about infringement. But then that is what my point is, you would not be complying with the terms of your licence, or if you were, your licence was really not very good to start with.

Mr WODETZKI—Exactly.

Ms ROXON—I am confident that Microsoft is not one of the losers in all of these things.

Mr CANDI—This section is about the rights management information. I cannot see under any circumstances why anyone would take it out, unless they were the copyright owner, for a specific purpose. We are putting in this encoding to give us the name, title, when the product was made and all that. It is all about the ownership and the copyright details in the same way as a label is. I cannot see Mr Wodetzki's point here. This is about the label; it is not about anything else. It is a pretty stand-alone section, I think.

Mr HALPRIN—I would suggest that there are possible occasions where that would be necessary specifically in regards to the computer amendments bill where you are working on reproduction or adaption of a work, as allowed lawfully by the computer programs bill, then they may involve—I am not saying it will, but there is potential for it to involve—alteration or removal of that information. Again, it goes to where there is not actually infringement. I suggest there are possible grounds for wanting to be able to do that.

Mr METALITZ—In this case, as contrasted with the anti-circumvention provisions, it is part of the course of action that the person knows or ought reasonably to have known that removal or alteration would induce, enable, facilitate or conceal infringement of copyright. So there is the tie to infringement that Mr Wodetzki is so eager to have in the anti-circumvention provisions that exist here, and that is the protection against the concern that he has articulated. It exists here because the treaties have it as well. I think that explains the difference.

Mr CANDI—Moving on to section 116C, we have a very minor addition. At the top of page 7, subparagraph (c) is set out. It appears, through an unintended omission, that the words which are underlined there, 'ought reasonably to have known', which are consistently used throughout 116, have been omitted by accident or error. I cannot see why they should not be there. The new subparagraph (2) that we added, which starts with the words 'a person removes or alters' is an error by us. Strike that out; that is already dealt with in section 116B and is required by the treaties, but we put it in twice, by error.

I do not think we have any changes to 116D. It did strike us that one thing not covered by the bill, moving to page 8 of our document, is that section 119 is a section which says that the copyright owner or the exclusive licensee brings the infringement action. In fact, it says, from memory, 'You are either a plaintiff or a defendant if you are one of those people,' and it then goes on to say, 'The remedies set out in sections 115 and 116 are available to the exclusive licensee.' This bill seeks to add—it is a very simple point—sections 116A, B, C and D, and we are just saying that 119 needs to have the references to those extra sections added, for consistency and for commercial commonsense. I will stop there, before I go on to 132.

CHAIR—Are there any comments on 119?

Mr GONSALVES—I was going back to the other point we were discussing earlier, because I do not think we quite finished 116B(2), which refers to the person who may bring an action. It refers to the owner or licensee at the moment. Our point is that that is too broad, because it encompasses a very large universe in the case of mass-produced licensed products, like Microsoft Windows. Our suggestion would be to say, 'The owner or any person authorised by the owner', which I think would get over the problem, because the average licensee of Microsoft Windows obviously is not authorised to bring an action in relation to rights management information, or circumvention devices, for that matter.

Ms ROXON—But that presumably allows major licensees, for want of a better way of describing them, who may have an interest in pursuing an action in a particular country, to be able to do it?

Mr GONSALVES—Precisely. It would encompass that. That point also applies to the circumvention devices section, but as Mr Metalitz said earlier, there are a couple of errors in this draft; perhaps we could provide a corrected version with the things that we have discussed.

CHAIR—There is a division in the House which requires us to go and vote, so I will suspend the hearing until the division is over.

Proceedings suspended from 11.33 a.m. to 11.47 a.m.

CHAIR—I understand that you would like to take a few more minutes on this issue, Mr Candi.

Mr CANDI—Yes.

CHAIR—I would like to try to finish this by midday and move to the second hearings.

Mr CANDI—We will endeavour to be very quick. If I could stay with the same document that we handed over and jump to page 11. Before we get to page 11, I would like to say that all the arguments we have gone through before pertain to the other changes that we have suggested to section 132. But there was one item left out of 132 that we felt should be dealt with. We have set that out on page 11 with a subheading, 'Additional amendment to s132 omitted by the bill'. It has come from our colleagues in the software industry. With your permission, I will hand over to Mr Gonsalves.

Mr GONSALVES—If I could take the second amendment first, in subsection (2) we are proposing to add 'or communicate to the public' in addition to 'distributing' to ensure that in the online world there is an offence for Internet piracy.

This is an omission that has not really been discussed at all in the bill. Although we are introducing a new right of communication, and civil remedies flow from that, there is nothing to introduce a criminal sanction against Internet type piracy. In its report on software protection, the Copyright Law Review Committee found that this was a specific problem with the current wording of the act because distribution is likely to be restricted to physical copies. This is simply making it clear that communication online of pirated copies is also an offence if it is for commercial purposes.

Ms ROXON—This position applies only if the person communicating that should know, or ought to know, that the copy they are using is not one that they have paid for. I am just seeking clarification. This is not a general provision which prevents the communication to the public of other copyright materials if you legitimately have a copy within your possession. It will not cover libraries. It will not cover anybody that has purchased the materials to start with.

Mr GONSALVES—It is restricted to infringing copies, and you have to know, or have reason to think, that the copy is an infringing copy. It is simply the online equivalent of the physical distribution which is already covered. It is not intended to go any further than that.

Ms ROXON—Except that the physical provisions relate to the copying, not to the using or reading, do they? Once you try to extend it to the digital environment, when you use words like 'communicate it to the public', aren't you also catching access rather than continuing to copy? You are punishing the person who does not know that it is an infringing copy.

Mr GONSALVES—No. That person must know, or ought to reasonably know, that it is an infringing copy that they are communicating to the public.

Ms ROXON—Right. I have to think about that a bit more.

Mr GONSALVES—Whilst we are amending section 132, the other amendment is intended to include an offence in the UK legislation and one we believe is required by TRIPS. That is an offence of possessing an infringing article in the course of a business, which is not currently covered. That relates quite specifically to the software industry where large numbers of copies of computer software are made in the course of a business and are currently not covered by the criminal provisions of the act.

Mr HALPRIN—There is no apparent reference to knowing infringement. In the case of pirated software, would I be correct in interpreting this as saying that the business owner would become liable, even if they were not aware that they had illegal copies that employees had loaded on their system?

Mr GONSALVES—No. It is qualified. Look at the words there 'if the person knows or ought reasonably to know' the article to be an infringing copy. That qualifies all of the criminal offences under the act.

Mr METALITZ—I will comment very briefly on both of those amendments. On the first one that Mr Gonsalves talked about, I think it is important to conform the civil provisions with the criminal provisions to create an offence. It is particularly important outside of the software field because there is an existing provision in section 132(5)(a) about transmission of a computer program that results in the creation of an infringing copy at the end. This is important for works other than computer programs. If someone sets up a web site and uses pirate material on that web site, even if it is in a circumstance where the copy is not created at the user's end, it should still be an offence if the requisite knowledge is there that the person knows, or reasonably ought to know, that it is an infringing copy.

On the second point that Mr Gonsalves talked about, which comes first in this amendment, this is extremely important for the reason that he has stated. It is one that I know you have talked about in the copyright enforcement inquiry as well. The ambiguity or the lack of a clear criminal offence for end user software pirates with business software in Australia is a serious concern and one that we would encourage Australia to resolve in the language that Mr Gonsalves has suggested.

CHAIR—Mr Wodetzki, I think you wanted to make some comments.

Mr WODETZKI—Thank you, Mr Chairman. First, in relation to some of those last points, some seemed to be not really digital agenda issues and enforcement inquiry issues. I really do not know why they would go in until the enforcement inquiry has concluded.

I have another quick response in relation to some of the changes in this document. They have changed the knowledge test in relation to the criminal sanction back to an 'ought reasonably to have known' language rather than 'is reckless as to whether' language. My understanding is that it was deliberately different because, when you are dealing with criminal sanctions, the consequences are much more serious, and the knowledge test ought to be higher. I do not recall hearing any explanation for that, but I do not suggest we get one now because we are running out of time.

We have also submitted some language on section 116A. We probably do not have time to go through it today. We might make some quick comments about it tomorrow if the opportunity arises. Essentially, it suggests some language for achieving what we see as the desirable outcome of creating a link between infringement and devices rather than severing it. There are some other changes there. We probably do not have time to go into now, so I will not.

Mr GONSALVES—I have a very quick response to that point about the knowledge test. If you look at page 11 of the sheet, the knowledge test is in the criminal section provision 132 which says 'if the person knows, or ought reasonably to know'. All we are saying is that, for consistency, the criminal offences relating to circumvention devices and the electronic rights management information should be the same. We are not suggesting that it should be anything different to the current law.

Mr WODETZKI—The circumvention laws are not about copyright infringement. They are a whole new set of laws. It seems as if they wish to talk about them as if it is just another form of copyright protection. It is not. It is a whole separate form of protection which does not need to parallel copyright at all. There is no link. There is no logical or other link.

CHAIR—I thank you all very much for your participation, comments and cooperation this morning. It is something which is useful for us in terms of looking at the issues.

[12.04 p.m.]

Participants

BRENNAN, Mr David, Consultant, Screenrights

CANDI, Mr Emmanuel, Executive Director, Australian Record Industry Association and of the Phonographic Performance Company of Australia Ltd

COLLIE, Mr Ian, Consultant, Australian Screen Directors Authorship Collecting Society

COTTLE, Mr Brett, Chief Executive, Australasian Performing Rights Association

HARRIS, Mr Richard, Executive Director, Australian Screen Directors Association, and Executive Director, Australian Screen Directors Authorship Collecting Society

HERD, Mr Nick, Executive Director, Screen Producers Association of Australia

IRELAND, Ms Lynette Frances, Legal and Policy Coordinator, Australian Subscription Television and Radio Association

LAKE, Mr Simon Thomas, Chief Executive Officer, Screenrights

McCULLOCH, Mr David Campbell, Director, Broadcast Policy, Federation of Australian Commercial Television Stations

MEREDITH, Ms Tracey, Legal Adviser, Federation of Australian Radio Broadcasters; and Legal Adviser, Federation of Australian Commercial Television Stations

METALITZ, Mr Steven, Vice-President and General Counsel, International Intellectual Property Alliance

O'BRIEN, Ms Cathy, Solicitor, Australian Record Industry Association and of the Phonographic Performance Company of Australia Ltd

RICHARDS, Ms Debra Shayne, Executive Director, Australian Subscription Television and Radio Association

Session 2—Retransmission and broadcast issues, including the statutory licence scheme for retransmission and enforcement for broadcast decoding devices

CHAIR—Welcome. We will continue with the second session which relates to retransmission and broadcast issues. I think many of you were present in the room, if not at the table, at the beginning of the first session, but can I just say that we are conducting this in a roundtable format to enable some testing of various propositions that have been put

forward to us. If you have questions for other members, could you direct them through the chair.

I should advise those who were not present that these are legal proceedings of the parliament and warrant the same respect as proceedings of the House itself. The giving of false or misleading evidence may be regarded as a contempt of the parliament. These proceedings are protected by parliamentary privilege and will be published in *Hansard*. Dealing with the issues, the first one was the extension of copyright protection to non-broadcast communication. Does anybody want to lead off with any comments in relation to it?

Mr McCULLOCH—Mr Chair, I want to indicate that there is a submission from FACTS. In fact, the issue of extension of copyright protection to non-program carrying signals is not an issue that we would realistically expect to be addressed in the context of this legislation, it is clearly a policy issue that goes beyond the government's intention. However, we do think that within the policy framework of the bill there are deficiencies in the remedies that are provided with respect to the unauthorised interception of broadcast. The broader issue of copyright protection for program carrying signals is a matter we have made submissions on in the context of your inquiry into the enforcement of copyright.

It might assist the committee if I could provide an assessment of piracy and broadcast issues in the copyright and broadcast environments because many of the difficulties that we find with this legislation are caused by the fact that there are disagreements within the government as to where these provisions should properly fit, whether in copyright law or in broadcast law.

CHAIR—Yes.

Mr McCULLOCH—As I have indicated, there are different worlds, there is a copyright environment and a broadcast environment. In the copyright environment, the issue of unauthorised interception is a difficulty because the act of interception is not one of the rights given to the owner of the copyright. That is the case whether the signal is encrypted, as it is by subscription broadcasters to prevent the receipt of the signal without the payment of a fee, or in the case of free-to-air broadcasters where signals are encrypted for the purpose of preventing receipt of the signals outside intended licence areas.

The concern of both free-to-air broadcasters and subscription broadcasters is that a remedy is provided where the signal is intercepted in an unauthorised manner. Remedies can be implemented in a number of ways. The most direct form of a remedy is one with respect to the interception of the signal itself. A second means is dealing with devices which enable the reception of the signal, and it is the latter which are dealt with in this legislation.

Back in 1994 the previous government commissioned the Copyright Convergence Group to examine a number of copyright and broadcast issues. That committee recommended that there should be criminal and civil sanctions to prevent the unauthorised reception of encrypted signals.

The commentary to the draft exposure bill indicated that the government intended to implement that commitment. However, it indicated that it was not its intention to implement that commitment in copyright legislation in the digital copyright bill because the act of interception was not an infringement of copyright and it was not the appropriate legislation for inclusion. They indicated that consideration was being given to fulfilling that commitment in other legislation.

The difficulty we have is that it is unclear where that commitment is going. Indeed, there is some suggestion that the broadcast decoding device provisions of this legislation are directed towards fulfilling that commitment. That is entirely unsatisfactory from our point of view because the decoding device provisions of the current bill only deal with the subscription situation, not a free-to-air situation.

I should mention that the broadcast decoding device provisions were not originally included in the draft legislation. They were included following representations from ASTRA and from FACTS that this bill should include specific remedies in relation to the interception of signals or, alternatively, the circumvention device provisions should be adapted to deal with broadcast decoding devices. The government chose the latter. As I have indicated, they are unsatisfactory because they do not deal with the free-to-air situation. I am happy to elaborate on that when we get to the next item.

However, even if this bill were to address those points, there still remains the issue of the need for legislation in relation to the interception of both broadcasts and of signals. That comes back to the initial point of this item in relation to program-carrying signals as opposed to broadcasts.

Copyright legislation protects broadcasts. However, the ability to intercept and inappropriately utilise the intellectual property also extends to the interception of program-carrying signals. If I can give an example. When Channel 7 is broadcasting the AFL grand final, Channel 7 in Sydney will send a feed to all its network stations and to its affiliates. Those stations in turn will broadcast the signal to the public. It is only the broadcast from the station to the public that is a broadcast and therefore protected. The feed from Channel 7 in Sydney to the other stations is not a broadcast; it is a program-carrying signal.

Therefore, provisions relating to interception must cover both broadcasts and program-carrying signals. We accept that in a copyright environment that is probably not appropriate because copyright only protects broadcasts, but it is an issue that needs to be considered in other legislation.

Ms ROXON—What damage is caused by that in that example?

Mr McCULLOCH—To give you an actual example: pubs in Melbourne in the past have used decoders to intercept Channel 7's network feed and they have displayed the AFL to its patrons in Melbourne when that particular game would otherwise be subject to a contractual blackout. So it has significant detrimental consequences for both the rights—

Ms ROXON—Because you would normally charge the pub a certain amount if they wanted to do that? I do not understand the commercial loss.

Mr McCULLOCH—No. The difficulty is that it threatens licence area integrity. In our broadcast structure Australia is divided into particular areas. Broadcasts can only be contained within those particular areas. In the case of the broadcast of sport, there are frequently blackout situations where the AFL will prevent the broadcaster from broadcasting a particular event in a particular city, generally because it is being played in that city and they want to increase ticket sales.

What happens in the case where the Channel 7 signal is broadcast in Melbourne is that the AFL contacts channel 7 indicating that they are in breach of their obligation to prevent the signal being broadcast in a blacked out area.

CHAIR—As I understand you, you are saying that this is something which needs to be addressed. It may not necessarily be appropriate to address it in this legislation, but you are flagging that it still needs to be addressed. Is that your point?

Mr McCULLOCH—There are a number of steps. As a first step, at the very least, the broadcast decoding provisions of this legislation which deal with circumvention devices need to address the free-to-air situation. This is an issue on which we have provided submissions and briefed the committee in relation to its inquiry into the enforcement of copyright. What happens is that, for example, GWN in WA broadcasts via satellite to remote areas. People within the GWN licence areas are given satellite decoders to receive the signal and that decrypts the signal. What has happened in the past is that those decoders pop up in the Perth licence area and pop up in pubs and publicans are able to broadcast blacked out sporting events.

What we are saying is that the broadcast decoding provisions of this bill need to be amended so that they prevent the use of a broadcast decoding device to receive a free-to-air signal outside its intended licence area. There is a policy concern on the part of the government that the current provisions not extend from dealing and manufacture to use because that is seen as an inappropriate invasion into people's homes in the subscription context. In the free-to-air context, the use is for a commercial purpose and we do not think that that policy concern arises in this case.

As a next step, in this legislation there should be provisions relating to the actual interception of broadcasts and, in either this or other legislation, there should be provisions relating to the interception of both broadcasts and program-carrying signals. The final step, which gets back to the substance of this item, is copyright protection for program-carrying signals. That is an issue which is being considered internationally and we would urge the Australian government to track those international developments and respond accordingly in domestic law.

CHAIR—Is there any other comment on this issue?

Ms IRELAND—This is also an issue for ASTRA members as well. There are actually two ways that signals are provided, particularly for international channel suppliers. They might either deliver a channel feed to a particular broadcaster in encrypted form, or it may come in in unencrypted form. Then the particular licensee will encrypt the signal before it is sent out to our subscribers. In terms of the unencrypted signals, we know there are currently

people who are operating on a commercial level who are aware of which signals are coming in in unencrypted format and have set themselves up in business where they say, 'Let people know they can write to us. We will send you out a satellite dish and a decoder box and tell you where to point your dish to enable you to receive these signals.' Rather than those people actually being subscribers to a particular licensee, there is a real loss of revenue happening for us because those people are obviously illegally receiving a signal in a manner that we would prefer they did not.

CHAIR—Yes, I understand that. Are there any further comments?

Ms MEREDITH—Could I add that this issue has probably achieved more prominence in the last seven years to 10 years because there is, of course, a much greater incidence of program material being transmitted in that fashion by satellite. Whether that is from an international program supplier or domestically, it is occurring more frequently now and therefore it is a problem. It has gained in significance and will no doubt gain further.

CHAIR—Thank you. Let us move on to manufacturing and dealing in devices for the unauthorised reception of encoded subscription broadcast signals. Does anyone wish to make a comment on this?

Mr McCULLOCH—Can I follow on from what I said previously? At the very least, what is required is that these provisions be amended to include a prohibition on use or possession of a satellite decoder to receive a free-to-air signal outside its intended licence area.

In the discussion document, the government seems to indicate that this is appropriate for inclusion in broadcasting legislation. From a policy perspective, we cannot see that it is any different then the broadcast decoding provisions that are in the legislation currently which, as the government has indicated, are designed to protect contractual obligations between subscribers and pay operators. In our case, the provisions would be designed to protect the licence area concept and the contractual obligations between the broadcaster and the rights owner.

CHAIR—Are you suggesting that in the definition of—

Mr McCULLOCH—To address the issue there would probably need to be another stand-alone provision that specifically addressed the situation. It may be possible to amend the existing provisions applicable to subscription broadcasters but we are asking for prohibition on use and that is not something that is contained in the provisions at the moment.

Ms ROXON—It might be in the material but I have not seen it yet: isn't prohibiting use to enable Channel 7 or any other organisation to take some action against a person who is infringing a different situation from prohibiting it and making it an offence? I can understand your concern in the sorts of examples that you have given, but I can equally understand why we have to take account of the sort of public interest concerns of individual people at home who feel that their rights are being infringed, compared with the pub that attracts 4,000 people on grand final day and makes a huge amount of money.

Mr McCULLOCH—Our concern is where the use of the device is for a commercial purpose.

Ms ROXON—So with any sort of extra provision that you think should be added in here, you would be happy with a proviso that it is for a commercial use?

Mr McCULLOCH—As a first point, we would accept what ASTRA would be saying, which is that it is not inappropriate that there be provisions preventing the use of these sorts of devices in a domestic environment. After all, it is essentially theft of copyright. However, if the committee and the government were not minded to that view, as a second tier we would accept provisions that limit the right where the use is for a commercial purpose because that is the practical problem from a free-to-air broadcaster's perspective.

Ms ROXON—Can you tell whether you have actually provided some suggested amended wording? I apologise if I have not seen it. I am not sure whether ASTRA might have provided that in their submission.

Mr McCULLOCH—On this particular issue we have not provided actual wording. We think the policy point that we are making is fairly clear in itself. We would be happy to provide suggested wording if that would be of assistance to the committee.

CHAIR—If you can do that it would be useful.

Mr McCULLOCH—Certainly.

CHAIR—We will move on to the next issue.

Ms IRELAND—Can I respond?

CHAIR—Yes.

Ms IRELAND—On behalf of ASTRA, we have actually put to the Copyright Enforcement Review that we would like to see provisions which mirror either 227 of the New Zealand Copyright Act or 297 of the Copyright, Designs and Patents Act 1988 of the United Kingdom. I have copies here if that would make life easier.

Essentially, what those provisions are saying is that they are introducing a prohibition on a fraudulent reception of an encoded broadcast. Both of those impose fines. The maximum fine in the United Kingdom is £5,000 and in New Zealand it is $NZ5,000. The US has similar kinds of provisions. I have not brought along that legislation, but these two are fairly similar. The UK section 297 was the section endorsed by the Copyright Convergence Group in its report *Highways to change* in 1994 as the recommended provision to be introduced to deal with this issue.

Responding on the public policy concerns expressed by the chairman, ASTRA feel that, while we are very happy with the broadcast decoder devices provisions which have been incorporated into the act at the moment, obviously they are going to deal with commercial

dealings in these devices. Essentially what we see happening is that, while they will be effective to some extent, it will force a lot of people to operate offshore.

Before the last committee inquiry, we showed you a few examples of web sites that have been set up. Because we are saying that illegal receipt of these kinds of services is legitimate at a domestic level but once you move it into a commercial level it is not, while the demand exists on the domestic level for these kinds of devices, the commercial operators will continue to exist and they will find a way to circumvent the current provisions. We see the only way to really be effective is to introduce provisions similar to the ones I have tabled today.

As we mentioned previously, there is a real potential for loss of revenue to operators, obviously, and to the underlying rights holders and program suppliers, and to government as well, particularly with the introduction of a GST next year. In terms of Europe, as we have previously mentioned, they estimate that in the market over there, which is a far more advanced market than here in Australia at the moment, one in five are receiving a pirated service. If you translate that back into Australia, if we as an industry were losing one-fifth of revenue on an annual basis, that would be a significant loss of revenue that could not be ploughed back in and applied for other purposes such as new productions, development of new facilities, new jobs and all those kinds of things, ultimately resulting in a further loss of revenue. We would recommend to the committee the introduction of those provisions.

CHAIR—Are there any further comments on this provision?

Ms ROXON—Does silence from the other witnesses indicate assent or disinterest?

Mr CANDI—We need to think about it.

Ms RICHARDS—Previously we have tabled, as Lynette said, examples of Internet activity about how can you swap your cards, get decoder boxes and illegally access this stuff without paying. As of two days ago, I received a phone call from a journalist in Brisbane who was asking whether this was a problem for us because she had been notified by someone offshore operating through the Internet that she could receive a decoder device that would actually circumvent the subscription services out here. So that activity is ongoing.

Mr METALITZ—From the copyright industry perspective generally, these provisions are a very important complement to the anticircumvention provisions that we talked about this morning. In the US they preceded the enactment of the anticircumvention provisions, but they really are addressed to a similar problem and go well together.

Mr LAKE—We would echo that also: from a copyright owner's perspective, we would also be supportive of anything which goes along the line of protecting those rights.

Mr HERD—Certainly the screen producers and copyright owners would support the position put by Mr Lake.

CHAIR—Thank you. We move to the topic of conversion of films from analog to digital format.

Ms MEREDITH—Could I speak on behalf of both FACTS and FARB on this issue? When we first examined the draft legislation, it appeared to us that this might well have been an unintended consequence, having regard to the government's policy on this issue. The concern of both radio and television broadcasters is that in due course they are all going to be broadcasting in digital form. In fact, television broadcasters presently are under a statutory obligation to broadcast in digital form in the not too distant future. Radio is not too far behind and there probably will be provisions introduced some time in the next six months to 12 months, as I understand it, relating to transmission of radio broadcasts in digital form.

Much of the material presently around is in analog form, particularly film material. That will have to be converted for digital transmission. Television and radio broadcasters are concerned that, in fact, this provision may unintentionally give rise to a reproduction right when that conversion process takes place. Therefore, in submissions made to this committee and previously, we have proposed that there should be an exception made for broadcasters where they are making an authorised broadcast and they are converting material from analog to digital for the purpose of making that broadcast.

CHAIR—I can understand that. Are there any comments?

Mr CANDI—I think I have some reservations. In regard to sound recordings and, I think, musical works, the act already provides what is called an ephemeral right, which gives the broadcasters the right to make a copy of the sound recording for the purpose of making a broadcast—to make a copy of a sound recording in the program for the purpose of broadcasting the program—and hold that for a period of 12 months, whether or not they have the permission of the owner of the copyright. If I understand what Tracey is saying, it seems to me that they are trying to extend that to not be limited by a 12-month period.

I should also say that the 12-month ephemeral period that has been in the Australian Copyright Act is, to my knowledge, the longest ephemeral period in the world. Certainly, in some European territories, it is 14 days, 28 days or six months or something like that. So we do have reservations. We understand what Tracey is saying. But if they have an obligation and they have got a deal or special consideration that they will not have any competition or whatever until 2008, for example, it seems to me they could probably sort this out. With sound recordings—and Mr Cottle is here and he can talk about musical works—it could be arranged by licence agreement. I cannot really see the need for this in this copyright act.

CHAIR—Why doesn't the 12-month provision that is currently there cover you?

Ms MEREDITH—The ephemeral provisions are very special provisions and they are drafted in a very special way. Leaving aside the issue of whether or not the ephemeral provisions cover this sort of circumstance, the problem with 12 months—particularly insofar as film is concerned—is that 12 months is never enough time. The ephemeral provisions are rarely relied on in relation to film because film is required to be kept usually for longer periods than 12 months. So they do not have an enormous application in the television area. In radio they do.

But again, because of the change in technology—and that is what we are really talking about here—this is simply a new method of transmission and, in our submission, it should

not give rise to a new right in that very peculiar circumstance, because essentially all we are talking about is a new way of transmitting broadcast signals. There is nothing that a broadcaster can do about that because the technology used for transmission is what it is and a broadcaster cannot elect to say, 'I'm going to transmit in analog form,' or 'I'm going to use equipment that has really been superseded from a technological point of view.' They have no choice, and it seems to us that the legislation contemplates that they have no choice. They are forcing a move toward digital technology.

The ephemeral provisions were drafted in 1968 and they may well be scope for amending the ephemeral provisions in due course to accommodate digital transmissions in a better fashion. But in this particular instance they will not cover this ongoing conversion process that must happen if, in fact, broadcasters are going to be able to use a backlog of program material.

Ms ROXON—Could you explain how this works in practice? If a television station gets permission or has a licence to broadcast or purchases—whatever the terms of it are—a film to be shown on Saturday night and negotiates the terms of its broadcast, do you purchase the rights to continue to broadcast that film in another 10 years time and are you negotiating those conditions now? Otherwise, presumably at the point where you are going to need to broadcast either in both analog and digital or just in digital, you will be able to negotiate whatever the terms are and whether you have to have access to conversion. I do not really understand whether it arises already or whether it is something you need to have resolved for the future.

Ms MEREDITH—It does arise already because program supply agreements obviously vary. As a general proposition, it is common that they will enable the television broadcaster to broadcast a film a given number of times over a given period. That period could be five years, seven years or 10 years. Once it goes beyond that then the agreement has to be renegotiated. The program supply agreement can be a very long-term thing and it usually has limits of numbers of particular broadcasts in particular circumstances.

Ms ROXON—You do really need to have some sort of predictability now.

Ms MEREDITH—Yes, you do.

Ms ROXON—If you were at liberty to discuss this, you would presumably be negotiating the terms of those agreements with the knowledge that we will be moving to a digital system at some time in the future.

Ms MEREDITH—That is true. But many agreements are, as I say, very long term and some of the output arrangements with overseas studios are particularly long term. I do not think one can necessarily in every case rely on pre-existing, fairly lengthy contractual arrangements to grant this right.

Ms ROXON—But what is to prevent a TV station from today onwards saying that they will negotiate, in the terms of their agreements, the capacity to be able to convert into a digital format and broadcast still in accordance with the other provisions in a contract?

Ms MEREDITH—In the future, nothing. But there is a wealth of material in television stations in respect of which the contractual rights have been granted some time ago, and in respect of which the broadcast will occur at some point in the future.

Ms ROXON—I understand your point. But digital television has not just been created overnight either. It is something that everyone has known has been coming at some point in time. I do not know that you would have been aware, but we have been discussing with the publishers exactly the same thing: why, when they are selling to people who are going to make their information available on the Internet, will they not charge a higher price to start with because they are aware that more people are going to have access to it than might have had access getting it from a bookshop or from a library? It is really the same point. Why could this not be dealt with in a commercial environment rather than legislatively?

Ms MEREDITH—It could be dealt with in a commercial environment in due course, and no doubt probably will be. The program supply agreements, one would imagine, would be changed and that would be covered in those agreements. Our concern is the pre-existing material. I do not think there is any way around that because they will be broadcast—

CHAIR—So you are really looking for a transition provision?

Ms MEREDITH—That is absolutely right. As I say, it should relate to an authorised broadcast where the permission to broadcast the film, the sound recording or underlying work has been granted. It does not seem to be unreasonable to be able to convert it from one method of transmission to another without having to pay an additional fee for doing so.

Mr COTTLE—The only thing I would add is that it is important to understand that the existing ephemeral licence provisions in the act are an exemption for reproduction to the extent that the reproduction made is only kept and used for 12 months. If the reproduction made—as in the case of the conversion of analog material to digital material that Tracey has mentioned—is retained beyond the 12-month period then a statutory licence applies. The parties go off to the Copyright Tribunal if they cannot agree commercial terms. There is a guaranteed process of resolution of any dispute should there be a difference of opinion in what value should be attached to that conversion. So far as the 12-month period is concerned, it is not a licence, it is an exemption. It is a free right.

CHAIR—The point about the transition seems to be a reasonable point, though, that government has decided there is a whole new regime to be applied. Ms Roxon's point, I think, is fair that, from now at least, if not before now, this has been known. Therefore, if you were negotiating a licence agreement, then presumably that is one of the things on your check list. I suppose if there were material around which has a contract covering an eight- or 10-year period and it was not reasonable to have knowledge about this occurring but you are caught in between, I would think some commonsense resolution to that would be desirable all round.

Mr COTTLE—Yes, I agree with that.

Mr METALITZ—Without regard to the specifics of a transitional exception as you are talking about, and we are not commenting on that particularly, but the provision that this

would be an exception to is extremely important. It is 21.6 which specifies that, with sound recordings and films, the digitisation of those materials is within the reproduction right. It is extremely important because it is a requirement of the two treaties. In fact, I think if anything it doesn't go far enough because it does not provide a generalised reproduction right for sound recordings which the Performances and Phonograms Treaty requires.

Any exception to this would have to be measured against the standards of whether the exception interferes with the normal exploitation of the work or unreasonably prejudices the interest of the rights holder or whether it is confined to special cases. It could be that there would be some way to fashion an exception that met those criteria but I wanted to emphasise the importance of this provision to which an exception is being requested. It is part of the treaty obligations that Australia is taking on.

Mr HERD—Could I add to that from the point of view of the screen producers. Yes, it is right that we have known for some time that the digital environment is coming and we have been giving considerable thought to what that means in terms of how we manage the rights that we own in producing a film and the rights that we need to acquire in order to produce the film. If you like, it is looking upstream at the dealings that we have with broadcasters and distributors and downstream to the relationships we have with other copyright owners such as composers, writers and so on.

There are a number of issues there which we are presently doing work on in terms of how we best farm our rights in the new environment. We are in discussion with both the broadcasters and representatives of performers to look at existing relationships and see how they need to be changed to take account of the new environment. That brings me to say that I think we would look to the legislation, as we move into the digital environment, to preserve our right to deal effectively with the copyright. As others have said, I think that the kind of exception that FACTS and FARB are arguing for is something which, certainly in relation to future works, could be dealt with in commercial negotiations.

CHAIR—Are there any further comments?

Ms IRELAND—This is also an issue for ASTRA members. While we are not being required by law to convert from analog to digital, this will be occurring. Obviously, from this point in time, now that we have knowledge of this right, we can enter into agreements that incorporate this right. However, over time, we have all been entering into agreements as well that did not contemplate this right. Quite often, the scenario happens where you are delivered submasters by your program supplier so you do not have a right to reproduce. This would leave us in a very difficult situation. Even with the ephemeral right, quite often our agreements are for a minimum of two years but also quite long term because, with pay television—and a number of us are running a number of channels 24 hours a day—there is some replay factor happening there as well. A 12-month ephemeral period would not be the best scenario for us to rely upon as well.

Ms MEREDITH—Mr Chairman, could I just make one last comment? My understanding of this provision is that its intention was really to protect material that currently is in analog form, that is loaded on to a server, for argument's sake, for transmission across the Internet. It is that sort of digital additional use, if you like, that I

understood was the real policy concern which has led to this sort of provision. It seems to me that that needs to be distinguished from other situations where we are simply talking about a different wheelbarrow in transmitting existing services. I think that they are quite different concepts.

Ms ROXON—Won't that be a difficulty when we will live in a world in the future where people actually will not have a television and a PC and all of the different things at home, when they will have the one unit on which they just determine that they will get access to Channels 10, 7, 2 or one of the subscriber channels or their word processing programs? Presumably the interests that you are representing would be back here again saying, 'Well, look, we are only really trying to deliver it in a different format. We now actually want to be able to put it onto the Channel 10 Internet site that people do not have to subscribe to'—or do have to if they start charging fees.

I understand the point you are making, which I think is entirely legitimate. I am just not sure how you would distinguish between those different types of uses and where you draw the line, other than in negotiating quite specifically at the start what it is that you are buying when you buy your rights or some rights to a particular field, for example, or anything else.

Ms MEREDITH—I guess in due course the particular concern that we have is, with the change of material from analog to digital form, it will disappear because it will all be in digital form in due course. So really our concern is merely a transitional thing from a present method of transmission and fixing in a particular material form, moving to another method of transmission and another material form, I guess you could call it. There seems to be some debate as to whether or not digital storage constitutes material form, but let us assume that it does: in due course this issue will go away for television and radio stations because it will all be digital and we will not have this problem.

Ms ROXON—But why will it go away if you have any channel, any station that says, 'What we are going to provide in the future is access to the 300 programs that we have played over the last six months, but you actually can just click on to them at the particular time that you want to watch them and you do not have to watch *Raiders of the Lost Ark* on Saturday night—you can watch it on Tuesday morning for all we care'? You will be back here then saying to us, 'This is just a new form of providing something that we have already purchased,' and presumably there is a difference because there will be a difference for the copyright owners as to how much access people are getting to it. Is it five showings over the next two years, or is it actually ongoing access for six months to anybody that has this different type of—

Ms MEREDITH—I guess that is the debate that is being held in another forum as to what constitutes a broadcasting service. But, leaving that aside, all we are talking about here is the reproduction right. It is just the right to copy, not the right to transmit and make an authorised transmission, but just the right to copy. That is all this provision is concerned with.

CHAIR—You are saying where you have already got the right to transmit subject because of an agreement you have entered into.

Ms MEREDITH—Yes.

CHAIR—But you are going to be precluded from that transmission because of the change in technology, so then for a transition period you should be able to make a digital copy in order to be able to exercise the right you have already purchased.

Ms MEREDITH—Yes. We may in fact not be precluded from transmitting the program at all. It is highly likely that the supply agreements will allow us to do that because they may not be technology specific. As long as it is a broadcasting service—and, as you would be aware, under the Broadcasting Services Act that is technology neutral—we would have the right to transmit the program, but what this provision may do is it may catch us at the step before that where we may have to convert the product that we have from its present analog form into a digital form for making that transmission.

Ms ROXON—I think it would be good if you could provide us with some suggested wording that you think is appropriate for those transitional provisions. That might be useful.

Ms MEREDITH—We are actually able to do that.

CHAIR—Mr Brennan, you have a comment, I believe.

Mr BRENNAN—One related issue which Screenrights might like to flag, not necessarily for inclusion within this round of amendments, is the issue of private or home copying in a digital broadcast environment which is, I suppose, in some senses a hot potato. Screenrights takes the view that where at home one can make a perfect digital copy, particularly in the high definition format which has been mandated within Australia, it is perfectly appropriate to consider that that is a very valuable use, a use which is an incursion upon the market of copyright owners and, in particular, copyright owners of cinematograph films. Some consideration has to be given in that environment to setting out a system such that people who wish to copy at home and to build up a library of copyright material in digital format and high definition format are able to make some payment back to the copyright owners in that material for the benefit of that use.

Mr METALITZ—If I may, on behalf of one of our member associations, the Motion Picture Association has raised this issue in their submission as well. I think this point is extremely well taken, that the home copying situation with regard to digital material is totally different from the home copying situation with regard to analog material. I would not actually suggest that it be made part of a reimbursement or a compensation scheme but that, in fact, it should be made clear that the copyright owner's reproduction right extends to private copying of digital material and copying in digital formats because, again applying the normal internationally recognised test, it has a much greater potential for prejudicial impact on the market than copying of analog materials.

CHAIR—I understand that, but whether we are talking about analog materials or digital materials, the ordinary provisions of the Copyright Act apply, don't they? What you are saying is, as a matter of technological device or the development of technology, then the ease and the quality of the copy becomes better. But that does not change the fundamental copyright provisions, does it?

Mr METALITZ—It does not change the copyright provisions, that is absolutely correct, Mr Chairman, but the question is—

CHAIR—If you are infringing copyright by making an unlawful copy then nothing has changed. It is the same as the arguments we have been having on other occasions; it is really just a question that, in a digital format, the quality of what you can copy is so much better. It is like you have a master copy with what you have reproduced.

Mr BRENNAN—But there was some attempt made in the late 1980s to introduce a blank tape levy scheme in respect of audiotape which was of course struck down in the High Court on a drafting ground. Screenrights view is that those sorts of home uses are the sorts of uses which could be considered to be uses that can be accommodated within that sort of regime either in an analog or in a digital environment, but the imperatives in the digital environment become all the more when the value of the copy is so great.

CHAIR—Yes, I think we understand your point. Any other comments on this issue?

Mr METALITZ—I would add on that, in agreement with Mr Brennan, that the existing law—you are absolutely right, Mr Chairman—does not change as a result of this, but our position would be that it should be re-examined. The balance that was struck in an analog world may not be the right balance in a digital world.

CHAIR—Re-transmission of free-to-air broadcasts, number of collecting societies. I am sure there are some views on this at the table.

Mr LAKE—First of all, Screenrights would like to warmly welcome and congratulate the government on moving in this area which we think is well overdue.

We also welcome the cooperative approach which ASTRA have taken to this issue, and our submission on this, as you can see, is focused on the whole issue of the number of collecting societies which should be declared and the method by which those societies should be declared. Just briefly, we would say that Screenrights has broad industry support to be the declared society.

We also say that if multiple societies have to declare, this may cause duplication of expenses occasioned by the separate administrations. One of the undertakings which we made to ASTRA as we were negotiating and attempting to get support for, or at least not opposition to, the establishment of this important new right—and this is the first right which has come around really in the audio visual world since the establishment of the educational copyright—is that the administration for the pay-TV industry would be clear and simple and, hopefully, that it would not cause undue administrative expenses towards the pay-TV industry. We would certainly hope that whatever legislation emerges keeps to that brief.

We also say that a multiple declared society model may not introduce competition into the administration of the licence except in so far as societies may be said to compete between themselves to increase their relative share of the re-transmission royalty base. We would also put it to the committee that a statutory licence of this type, in our view, lends

itself readily to one point of administration which is moulded to meet the requirement of the activity for which the licence is created, that is, re-transmission.

We think the consequence—and this again gets down to this point of administrative ease—of multiple societies administering the re-transmission statutory licence is that ASTRA's members must engage in multiple negotiations, and that could well lead to multiple disputes within the Copyright Tribunal with each society as to payment of what is an appropriate amount of equitable remuneration, or indeed the record keeping provisions.

Finally, we would say that in a multiple declared society model, like any declaration by the Attorney-General, it may well give rise to some complex administration decision or judicial review-type appeals as to the decision of the Attorney which could drag on for years and not benefit copyright owners because of the air of uncertainty over the re-transmission licence. They are our primary points as to why we would suggest to the committee that the one collecting society model is more desirable than the multiple collecting society model envisaged within the act.

Mr HERD—Can I say from SPAA's point of view we endorse the Screenrights submission. To give the committee an example of the administrative complexity that could creep into such a system from the point of view of the copyright owners, while producers are the owners of the copyright and the cinematograph film, they are also in many cases owners of the sound recording right in the film as well. So they are faced with the situation where, as a producer, you have to deal with two collecting societies over the re-transmission of the one work. That seems to us to introduce a level of complexity that is less efficient than the current system whereby you deal with one collection society for the one work.

Ms ROXON—Could you just explain that again? You are saying that you might have to deal with someone who owns the music, someone who owns the script, someone who owns the—

Mr HERD—For example, if the Attorney declared a collection society for the purpose of representing the owners of copyright in a cinematograph film and then a separate collection society for the owners of the rights and the sound recording, from a producer's point of view you would be dealing with two different collection societies.

CHAIR—So you are saying that the activity of the collection society should be referable to the re-transmission rather than to the nature of the copyrights involved in it?

Mr HERD—Yes.

CHAIR—I am trying to determine what the principle is here. We can all raise arguments based on various interests. Whether they are right or wrong is not the point. My question is, if that is the path we go down, what is the principle on which that is based—that is, it ought to be related not to the multifarious copyrights that may be involved in a transmission but to the transmission itself.

Mr HERD—That is correct. That is the system we have got in relation to educational copying. We would want to see that duplicated in relation to retransmission.

Mr LAKE—Our friend Mr Candi will disagree with this, but for the committee's information, with regard to what Mr Herd said about sound recordings, Screenrights has commissioned from APRA a representative sample of 200 different programs and the owners of the sound recording right within those 200 representative programs. Basically, what we came up with was that there were three broad classes of owners. The owners whom Mr Candi represents, the commercial sound recording holders, in the research commissioned came in at 54.5 per cent; the owners of the library sound recordings, whom Mr Cottle, through AMCOS, represents, came in at 10.5 per cent; and the owners of the commissioned sound recordings, whom Mr Herd represents, came in at 33 per cent. I will put that study before the committee. We would like to make the point that within that sound recording right there are multiple owners.

Ms RICHARDS—I would like to put on the record that ASTRA supports the submission put by Screenrights in that our members would prefer to deal with a single body in terms of its licence, for the reasons already outlined by Mr Lake.

Mr CANDI—I have a different view. The legislation as drafted, which provides for the possibility of a number of collecting societies relevant to that collecting society's repertoire to cover this retransmission licence, should be maintained. I have a number of reasons. It really has to do with commercial efficiency, commonsense and what the copyright owners of sound recordings, in the case of my submission, want.

It is simply this: in the case of TV broadcasters or subscription broadcasters, they have, or will have, in place a licence with PPCA, which is the collecting society for commercial sound recordings, to broadcast. In that licence will go a retransmission licence for the sound recordings that they are retransmitting in the free to air programs through their signals. Quite frankly, our copyright owners do not want that commercial reality to be usurped by an agreement which sends our sound recording rights to another collecting society, only to come back to PPCA, anyway, so that PPCA can then distribute that money. It just adds another administrative step to the process. Debra Richards' point is that they would like to deal with one. That is fair enough, but a copyright owner should have a say in this. We will already have licence agreements in place with these subscription broadcasters and this will be folded into it.

In regard to Simon's point on the chart that he has handed out, my understanding is that it has arisen in another matter that we were debating some time ago—that is, an analysis done on programs which were relevant to their core business which is in regard to the programs that educational institutions are copying off air. In the process of the argument regarding that chart, which shows the percentages of sound recordings, musical works or whatever, a key part of Screenrights' argument back to the commercial copyright holders through PPCA was that those programs are skewed towards—because it is being copied by educational institutions—programs which will have a low percentage of commercial sound recordings and a high percentage of either film score or what is called library music.

If you look at the total presentation of programs on TV, you will find that those percentages, in our view, and just by watching TV, will change, we would predict, dramatically towards commercial sound recordings. Those figures in themselves, as submitted by Screenrights, are not the indicative figure that I believe they are trying to put. I

am not criticising them because that was done in the context of a different exercise. I am seeking to distinguish them. Nevertheless, it does show, even in regard to something that should be skewed towards programs that do not use our recordings much, that we were still the predominant ones copied.

In regard to Mr Herd's point, the film producers will not be forced, if this legislation stays the way it is, to deal with two collecting societies. In the instance of Screenrights putting themselves up as one of those things, the film producers who own their own sound recordings can choose to have Screenrights administer that for them, in regard to this retransmission licence, as part of the whole film that they are also looking after for the film producer. The copyright owners of the commercial recordings, which is what PPCA does, will have PPCA do that. We already will have these licence agreements in place, anyway. I have put forward further material on this and I rely on that. There was a submission made some time ago.

In summary, I think that multiple societies, as provided by the act, is the right way to go for the reasons I have outlined. Nothing in what I am saying, by the way, would preclude Screenrights from presenting itself as a one-stop shop. If it puts a good case to PPCA and PPCA's members agree, we may well choose to do that, but we may not. I think it is important to keep those options open.

Ms MEREDITH—Mr Chairman, could I ask a question about that because I am a little confused regarding Mr Candi's point. The provisions in the legislation say that nothing prevents dealing with a copyright owner direct to obtain a licence in the retransmission context. I would have thought that, in this particular case, it would be open to Mr Candi's members to say, 'Yes, you may deal directly on the issue of retransmission on our part,' and he would not have to participate as part of the collecting society.

I do not think it comes down to an issue of having to have multiple collecting societies in that case, because you could well engage in a direct licence by dealing with, for argument's sake, PPCA, with PPCA simply acting as agent of the copyright owner rather than as a collecting society per se. I do not think that necessarily goes to the question of multiple collecting societies because you could still have one collecting society. Mr Candi's organisation could still deal with retransmitters if he wanted to—not in the capacity of collecting societies but simply as agent of the owner.

Mr CANDI—Tracey is just about right. The reason why she is not entirely right is that the definition of 'collecting society' in section 135ZZZT is a very specific prescription of a collecting society. It is indicative of the types of collecting societies that have been in legislation in the last 10 years, such as that involving the Copyright Agency Limited and Screenrights, and the ill-fated private audio copyright collecting society which the High Court knocked out on the blank tape levy issue. The section that Tracey is talking about is section 135ZZZC. I agree that that would, with the addition of just a few words, cover PPCA and it also would cover APRA, for that matter, as an existing collecting society for either sound recordings or musical works.

In 135ZZZC, taking words from section 136, which has been around for years, about licence schemes and factoring in the agency role of collecting societies for copyright holders,

if you add into that section that 'or any body of persons, whether corporate or unincorporated, acting as agent for the owner or prospective owner in relation to the negotiating or granting of licences,' then you get to what Tracey just said. It will also require a minor amendment to 136. That is the response there.

CHAIR—Can you provide us with that?

Mr BRENNAN—As a matter of principle, Screenrights welcomes any situation where a copyright owner can directly license the user rather than have to go through any collective society. In part 5A—statutory licence—a very similar provision exists such that what is called source licensing can occur. It does not enter into the equation for what would amount to equitable remuneration under the statutory licence. The incidence of voluntary licensing is one of the things which goes to the valuation of the exercise of the statutory licence. Screenrights would welcome a model where there was one collective society administering statutory licence with freedom of copyright owners who are so minded and who enter into voluntary arrangements with ASTRA's members, and for that to be taken outside the statutory licence altogether.

Mr COTTLE—If I could raise a related but slightly different matter at this point—and it is hopefully only a quick point—we think there is a major unintended consequence in the drafting of the part VC statutory licence for re-transmissions. The debate about this issue has always been centred upon the re-transmission by cable subscription television services of free-to-air signals. However, we think the drafting in its wide terms would pick up the so-called music on hold communication to the public through the telephone system.

The circumstance arises where a business has a music on-hold facility as part of its telephone customer service operation. The committee will recall that the High Court found that in those circumstances there is a cable transmission. There is a diffusion of the musical works to the public. The High Court found that Telstra was liable for that diffusion. The bill in other sections takes the liability away from the telephone carrier and puts it on the content provider which, in this example, would be the business determining what music on hold they have decided to use.

In circumstances where the music on hold comes straight from a radio transmission, then there will be through the telephone system a cable re-transmission of a free-to-air broadcast. Nobody ever intended that this complicated statutory licence should cover that kind of transmission. We think there needs to be either a specific exemption for that kind of application or that the application of the statutory licence itself should be confined specifically to cable broadcasters to take out of play completely the business that is music on hold. We cannot imagine that anybody would object to that change.

Ms ROXON—Why would your members not want some remuneration for that? Because it is being played on radio, it would be like paying for it twice.

Mr COTTLE—I did not make it clear. We certainly regard the usage in that circumstance as the exercise of the communication to the public right. Our members have to be paid. It is just that we say that the right ought to be administered directly by APRA because it is only music and it can be handled in a very straightforward, voluntary fashion.

Amendments to sections 135ZZC and 136 may take care of that situation. We think it would be absurd, for example, if a business paying $50 a year for music on hold had to serve notice on the collecting society and go through all of the procedures in that statutory licence, when a perfectly feasible voluntary licence scheme is already in operation.

Mr METALITZ—Mr Chairman, I would like to support Mr Cottle's observation from another perspective. This is discussed in some length in the Motion Picture Association submission that you have before you. His second option, that the application of the statutory licence should be limited to cable re-transmitters, is extremely important to all copyright owners. As currently drafted, it could be read to include re-transmission over the Internet or any other medium where there is no demonstrated need for the creation of a statutory licence.

As you know, the MPA believes that there should be an exclusive re-transmission right even in the cable context. If there is going to be a statutory licence, as this legislation proposes, it should be limited to the cable TV situation and not to re-transmission in any form and through any medium, as the current draft could be read.

Mr CANDI—The point that Brett and Steven are talking about is something that I wanted to raise as well. The problem stems from the definition in part 5C and this statutory licence that we are talking about for the re-transmission of free-to-air broadcasts. The definition used there of free-to-air broadcasts could include any broadcast. It should only refer to or be specific to television broadcasts, so it does not pick up audio only.

Mr Cottle's point is that his organisation, APRA, will take care of re-transmissions of audio broadcasts or on hold or whatever. Indeed, where it is relevant in regard to sound recordings, PPCA will be taking care of that. That goes to the whole issue that I was making before about the reason why the bill is right to have scope for multiple collecting societies.

In 135ZZI, on definitions to do with part VC, the third definition there of 'free-to-air broadcast', before the word 'broadcast', which appears a number of times in there, it should refer to television broadcasts, so it is clear that this is about the television broadcast of the free-to-air TV stations that the subscription broadcasters or pay-TV stations are re-transmitting, and nothing more. I can hand up a redraft of that as well.

I have just one other point while I have your attention. On the issue that was covered earlier about whether it is the Attorney-General that declares the society, we think it should be the copyright tribunal to make it consistent with other parts of the act. I have nothing against the Attorney-General, or the future Attorney-General in years to come, but we believe the copyright tribunal is the appropriate forum for that, as it is the appropriate forum in other areas to do with collecting societies in the act.

Mr LAKE—I will respond briefly to Mr Candi's last point about the choice which the committee faces between the Attorney-General and the Copyright Tribunal. The only other area where the Copyright Tribunal gets to declare the societies in the government copying regime, and the reason why the government did choose to go down that path, was because it might have been seen that, given that they would be paying a licence fee, there might be a perception that they may favour one society over another. They certainly did not want that.

My understanding of the thinking of the government was they moved that decision to the Copyright Tribunal.

In terms of statutory licences, speaking from the perspective of Screenrights, we greatly value the direct relationship which we have with the Attorney-General. The Attorney-General's provides clear guidelines—a road map—as to how they think we should act. We are in constant contact with the Attorney-General. We are about to have our annual general meeting at five o'clock today. When our books are passed, we put our books before this parliament, so that any parliamentarian can ask any question on our operations.

We think that there is a direct link there between our operations and parliament's imprimatur as to whether or not we are conducting ourselves in an appropriate fashion. We think that that link is incredibly important given the responsibilities as a trustee which we have been vested with. We do not think that that same link would apply if a copyright tribunal is gone through only when problems arise. From our perspective, it is a two-way relationship which we could not put a higher value on.

Mr BRENNAN—The issue that Brett raised, which was picked up by Emmanuel, was addressed in a joint drafting proposal put by Screenrights on behalf of the Retransmission Coalition and ASTRA in the lead-up to the drafting of this bill. Screenrights and ASTRA put together a joint proposal after we saw the provisions in the exposure draft which no-one was happy with. That joint proposal, a copy of which I can make available to the committee after today—I do not have sufficient copies today—sets out clearly that the scope of the statutory licence for retransmission had, as its only user, a subscription program provider as defined under the Broadcasting Services Act. For a reason which is not apparent to me, the department has opted to go with a broad definition of a retransmitter without limiting the licence in the way suggested jointly by ASTRA and ourselves. We would certainly recommend that the licence be limited effectively to someone forming the class of ASTRA's members.

Mr McCULLOCH—Can I raise a different point on the retransmission regime, which is to do with the keeping of records. The retransmission provisions of the bill impose an obligation on the retransmitter to keep a record of each retransmission made. It is not clear to us what level of detail is required. I wanted to point out to the committee that neither the retransmitter, I would imagine, nor the originating broadcaster, the free to air broadcaster, is in a position to maintain or provide information relating to underlying works and subject matter. That information, we believe, is properly obtained by the relevant collecting society.

As a matter of practice, Screenrights in its current role under the scheme for the copying of transmission by educational institutions obtains basic program information from the educational institution and, through its own sources, identifies the underlying copyright owners. We would hope that that would similarly apply in this case. If a regime which allows multiple collecting societies is going to require further information to be provided direct by the originating broadcaster or by the retransmitter, that, to us, would be an argument in favour of a single collecting society.

I make one brief additional point in relation to the point that Mr Cottle made concerning the limitation of the retransmission regime to cable transmissions. I just wanted to point out

that not all subscription broadcasters are transmitted by cable and it should be limited to our subscription broadcasts.

CHAIR—Are there any further comments on this provision?

Ms IRELAND—I confirm that ASTRA agrees with that view and disagrees with the MPA view that the right to retransmit should be limited to cable. It was never the government's intention to limit it to cable; it was supposed to be technology neutral.

Ms RICHARDS—And ASTRA supports the comments made by Mr McCulloch in terms of record keeping.

CHAIR—The final issue is the payments to film directors.

Mr COLLIE—I have a summary of our position, if that would assist the committee, which I can distribute, especially considering time constraints. Our position basically is that we are establishing a retransmission scheme which potentially can reward the key creators and owners of copyright and film, such as the producer, the writer, the composer, a record company, even an artist whose work is incorporated in a film.

It is our assertion that it is anomalous to not include another key creator of the film process, arguably the key creator, at least in a feature film context—the film and TV director. It is consistent with international developments. Overseas, there are many European retransmission schemes which provide the opportunity for a director to benefit from it. That is the reason why ASDACS, which is a copyright collecting society on behalf of Australian film and TV directors, was established to receive income on behalf of Australian directors obtained through retransmission and private copies in statutory schemes in many European countries.

Our position is supported by the Australian Copyright Council, as well as the Arts Law Centre of Australia. The creation of a retransmission scheme in this country which does not provide the potential for both local and overseas directors to benefit puts us in a very invidious position with regard to our obligations to those European collecting societies. When we entered into an arrangement with the overseas collecting societies from those retransmission schemes, it was based on the expectation that when a similar retransmission or private copy/blank tape scheme was established in this country, we would be able to reciprocate. We are now in a situation where we are not able to reciprocate. We are inconsistent with what occurs in most overseas retransmission schemes. Simply on a basis of international copyright developments and on principles of fairness and equity, we believe that the director, as a key creator of a film, should be reciprocated.

I appreciate—and I know this is noted in government policy—that the issue of authorship of a film, at least for copyright purposes, is yet to be determined. Although, obviously, for moral rights purposes, the authorship of a film has been, at least in policy terms, considered and agreed upon where the director is one of the co-authors of a film. We appreciate that we may be putting the cart before the horse but, in essence, we feel there are compelling arguments, based on commonsense, that a director, like all other key creators, should have at least the potential to be remunerated from the scheme and the fact that most overseas

retransmission schemes do provide the opportunity for directors to benefit outweighs perhaps the difficulty of introducing a retransmission right before the issue of authorship of a film is finally clarified.

Mr LAKE—Unfortunately, I have to catch a plane. In terms of Screenrights' position on this issue, Screenrights is a trustee and it is really up to the government to decide who should or should not be the relevant copyright owner. Our view, in short, is that we neither support nor oppose ASDA's position.

Mr HERD—I will not go into all the reasons that we have put in our submission as to why we are currently opposing the introduction of directors' copyright. This is essentially what ASDA is proposing. Mr Collie was right when he said that they are putting the cart before the horse. There are a number of issues to be considered in looking at the existing copyright regime as it relates to cinematograph film and determining whether there should be more than one owner of the copyright which has been dealt with in part by the CLRC's report but which needs to have further consideration.

Essentially, as a minimum, what we would be arguing is that this piece of legislation—the Copyright Amendment (Digital Agenda) Bill—is not the venue to consider all of the ramifications that would flow from changing the structure of copyright in cinematograph film. The legislation currently refers to the beneficiaries of the remuneration being relevant copyright owners. If, at some point in the future, directors become relevant copyright owners, they will participate in the scheme. It should be at that point in the future, when we have considered all of the policy and practical implications of changing the structure of copyright for a cinematograph film, that that issue should be dealt with.

Mr HARRIS—The point to be made here relates to the argument about whether there is going to be an introduction of directors' copyright or whether the issue is about equitable remuneration and whether that can actually be provided currently through contract, which I think is the main opposition in the paper that the government provided. We would argue that the contract has not really been the basis on which to actually deal with these matters.

We do not have residuals or buy-outs in the way they do in areas where they are mainly done through industrial negotiations such as in the USA and Canada. We do not have the re-transmission or statutory schemes that they do in Europe, where the industrial schemes are downplayed. Basically, what we are arguing here is that the government has recognised, essentially, through this re-transmission scheme, particularly in terms of protection of copyright, that there is not a level playing field and that there should be some protection of the creators. Our understanding was that the re-transmission scheme was there to reward creators. It was more a matter of convenience than a matter of government policy to exclude directors from this scheme. It was simply said, as a matter of convenience, we will reward those who are currently underlying copyright holders. But we are basically saying that because directors, more for a reason of anomaly than anything else, are essentially being excluded.

Ms ROXON—Why can't they be dealt with by contract?

Mr HARRIS—They can be, but the point is that in Australia they have not been. It has been a kind of historical accident. We have been left somewhere in the middle and maybe somewhere down the track they will be able to be dealt with in contract.

Ms ROXON—I can understand perfectly your point of concern and I share your own recognition that maybe this is not the forum to solve that problem. However, I do not understand, given that your members know that that is currently what the law is, why they are not in a good position to be able to negotiate terms, not necessarily to have some ongoing payment for it, but their one-off payment for their services in directing a particular film is not taken into account.

Mr HARRIS—Quite simply it is the same recognition that the government made in devising this scheme: that there is not a level playing field for those who are actually either employing or using a director's work. Essentially that is the position.

Mr HERD—Can I quickly respond to that and say that there is a well-established industrial and common law environment to deal with this issue. I cite the example of the relationships producers have with performers. Absent any performers's copyright for the last 18 years, we have had an agreement with the Media Entertainment and Arts Alliance which provides for payments to performers for the use of their work and payments for repeats and residuals. It is perfectly open in the current environment for such an agreement to be negotiated between ourselves and ASDA. We have been talking about—

Ms ROXON—They might hold you to that, Mr Herd.

Mr HERD—They have put it on the table. It is capable of negotiation. That is my point.

Mr HARRIS—The point is essentially—

Ms ROXON—Negotiating power.

Mr HARRIS—It is negotiating power, and there has been an agreement for actors for the last 18 years, but this Screen Directors Association has only existed for the last 18 years. There may be some instances where there may be more negotiating power in the future. What we found in Australia is that there are fewer and fewer opportunities for TV programs to finance fully in Australia. They have been needing to get more and more overseas sales than they had in the past. Directors fees have basically not been dealt with as part of that. Producers have found that licence fees have been relatively squeezed. They have been looking overseas to get more of the profit or to actually recover their production costs, but directors have not been included in that kind of equation. That is essentially what has happened.

Mr METALITZ—On behalf of IIPA, and particularly the Motion Pictures Association, I want to associate myself with Mr Herd's earlier remarks concerning the proposed amendment. I am sure I would agree with his later remarks too if I knew more about the situation in Australia, but I do not.

CHAIR—I thank you all for your contribution to this session and those who were here for the earlier session. To repeat what I said earlier, it has been very useful for the committee to be able to engage in this roundtable presentation and to tease out some of the issues in more detail. If there is any further material arising out of the discussions this morning that anybody would like to forward to us, or anything which you indicated you would, I invite you to do so. I ask you to do that quickly because we are trying to work to the timetable which we were given in relation to this matter.

Resolved (on motion by **Ms Roxon**):

That this committee authorises publication of the evidence given before it at public hearing this day.

Committee adjourned at 1.35 p.m.